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President's Page

SINCE this is the first of the four opportunities which shall come to me to address all of the members, my first urge is to express my deep appreciation for your sufferage. No man should enter upon any great or important undertaking without first invoking the blessing of God. This I do, with the further prayer that I may be permitted, in some reasonable measure, to live up to the records of the illustrious men who have preceeded me in this high office. No man, it would seem to me, who honestly weighs the duties and responsibilities of office, would assume that he can succeed without the help of his fellowmen! Surely that knowledge gives me great confidence, for the friendship and support of the members of this association have been the roadmarks of my professional life, and have constituted innumerable happy mileposts in the flight of time.

This has been an extremely important summer in the professional life of the America lawyer. Everyone expected John Kluwin's program at Atlantic City to be outstanding and none was disappointed. The speakers, the Open Forums, the social events—all—were enjoyed by over eight hundred. Then followed, for many, the American Bar Association, (Insurance, Negligence and Compensation Section) meeting in New York City, and it, likewise, was crowned with success.

A considerable group of us travelled to London for the first overseas convention in thirty-three years. The land from which has sprung the common law, the greatest system of legal justice known to man, outdid imagination and defied description in a program that continued for more than a week. It would be impossible to relate the details, or attempt comparison of the magnificent events of that convention.

Socially, of course, the Queen's Reception and Garden Party at Buckingham Palace is never to be forgotten. The gracious hospitality of the royal couple and family to visiting Americans created, without exception, a most extraordinary happy and favorable impression.

The dinners and speeches at the various Inns of Court (every registered lawyer from the United States was invited to one) probably deserves first rank among the programs for the profession. The brilliance and wit of the English barrister as an after dinner speaker is, apparently, unparalleled. The hoary antiquity of the Inns has recorded the names of great men. We retired from a glorious evening with a sense of better understanding and appreciation of barristry, its history and accomplishments. Probably the crowning event of the entire conclave was the address of Sir Winston Churchill to the delegates. This closing function was, of course, international in concept.

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NEW YORK MID-WINTER LUNCHEON

The sixteenth annual mid-winter cocktail party and luncheon for all members of the Association and their families and guests will be held on Saturday, February 1, 1958, at 12:00 noon, in New York City. The meeting will be held at The Plaza Hotel.

As usual, notices will be mailed to all members in New York, New Jersey, Pennsylvania and Connecticut. Others desiring to attend should write to Chairman Price H. Topping, 50 Union Square, New York 3, New York, for reservations.

Serving with Mr. Topping on the permanent committee on arrangements are Milton L. Baier and Ernest W. Fields.

Biographical Sketches of Newly Elected Officers

President

FORREST A. BETTS, 900 Wilshire Boulevard, Los Angeles 17, California. Born Rush Hill, Missouri, May 5, 1897, son of Amos Arthur and Lorena Betts. Married to LaVelle Nelson, 1926. Received A.B. and LL.B., Stanford University, 1922; admitted California and Arizona Bars, 1923. Fellow and Regent, American College of Trial Lawyers; member American Bar Association; former member Council of Insurance Section, American Bar Association; State Bar of California; State Bar of Arizina; Phi Delta Phi; Los Angeles Country Club; Jonathan Club; Member of law firm of Betts, Ely & Loomis; Member of I.A.I.C. since 1936.

President-Elect

G. ARTHUR BLANCHET, 99 John Street, New York 38, New York. Born Manchester, New Hampshire, July 31, 1902. Married Lucille A. Kennedy, April 4, 1932; five daughters: Mrs. John J. Conklin, Jr. of Little Silver, New Jersey, Mrs. Theodore J. Reiss of New York, and the Misses Margaret Ann, Rosamond and Carole Blanchet. Received A.B. Holy Cross College, Worcester, Massachusetts, 1924; L.L.B. Harvard Law School, 1927; admitted to practice in the Commonwealth of Massachusetts and the State of New York; member of the firm of Bigham, Englar, Jones & Houston, New York, New York; member of America Bar Association, Bar Association of the City of New York, Maritime Law Association of the United States. Member of India House, Drug and Chemical Club. Member of Insurance Counsel since 1939.

Vice Presidents

JAMES A. DIXON, 908 Ainsley Building, Miami 32, Florida. Born Burkesville, Kentucky, July 4, 1900. University of Kentucky and Harvard Law School. Admitted to Kentucky Bar 1924, Florida Bar 1925. Partner in Dixon, DeJarnette, Bradford & Williams. Admitted to practice F.C.C., 1943, Treasury, 1944, I.C.C., 1955; and U.S. Supreme Court. Member, A.B.A. Sections: Insurance Negligence and Compensation Law, Administrative Law, Anti-Trust Law, Real Estate, Trust and Probate. President for several years of Harvard Law School Association of Florida. Married September 10, 1926, to Ruth Richards. One son, James A. Dixon, Jr., admitted to Florida Bar, 1951. Author of numerous articles for legal journal. Active on various bar association committees. Alpha Tau Omega. Miami Shores Community Church. Member of I.A.I.C. since 1935.

JOHN W. JOANIS, 200 Strongs Avenue, Stevens Point, Wisconsin. Vice President and General Counsel, Hardware Mutuals. Born Hopewell, Virginia, June 13, 1918. Elementary and high school at Washburn, Wisconsin. University of Wisconsin L.L.B., June, 1942; Phi Delta Phi. Military service 1942-1945, Air Corps—Navigator; final rank, Captain. Private practice, Thompson & Gruenewald, Oshkosh, Wisconsin 1945-1947. Member: Madison Club, Milwaukee Athletic Club; Portage County Bar Association; Wisconsin Bar Association; American Bar Association. Chairman of Executive Committee of Wisconsin Mutual Insurance Alliance. Member of Legal Committee, Taxation Committee and Chairman of Automobile Committee of the American Mutual Insurance Alliance. Chairman of the Administrative Committee of the Health Insurance Association of America. Married Marian G. Sinrud, three children, Susan Kay, Mary Ellen and William John. Member of I.A.I.C. since 1953.

Executive Committee

KRAFT W. EIDMAN, 8th Floor, Bank of the Southwest Building, Houston, Texas; Partner, Fullbright, Crooker, Freeman, Bates & Jaworski. Born Liberty Hill, Texas, January 17, 1912. Rice Institute and University of Texas. BA and LLB 1935. Admitted to Texas Bar 1935. Married to Julia Mary Bell, three children, Greg, Dan and John. Member American, Texas and Houston Bar Associations; I.C.C. Practitioners Association; A.T.O.; Phi Delta Phi; Briar Club; Houston Club; Houston Golf Club and Champions Golf Club. Member of I.A.I.C. since February, 1951.

JOHN C. GRAHAM, 151 Farmington Avenue, Hartford, Connecticut. Associate Counsel, Aetna Casualty & Surety Co., Hartford, Conn. Born Cleveland, Ohio, August 14, 1914. Yale University, B.A. 1936, LLB 1939. Admitted to Connecticut Bar July, 1939. Member, Hartford County, Connecticut State and American Bar Association. Married to Elizabeth B. Graham, daughter Courtney Ann and son John Bunford. Member I.A.I.C. since 1948.

THOMAS N. PHELAN, Q. C., 95 Richmond Street, West, Toronto, Ontario. Phelan, O'Brien, Phelan and Rutherford, Graduate University of Toronto, B.A., LLB, 1902, Osgoode Hall Law School, 1905; Appointed Queen's Counsel, 1920; member Canadian Bar Association; Psi Upsilon Fraternity; Clubs: Granite, National, Rosedale Golf; married Alice Ray Clancey (deceased April, 1957), two children, Roderick, member I.A.I.C. and (Mrs.) Mary Joyce Russell; Member of I.A.I.C. since 1937.

GORDON H. SNOW, 3450 Wilshire Boulevard, Los Angeles 54, California. Born Chicago, Illinois, 1907. Attended the University of Wisconsin (PH.B.), San Francisco Law School and Golden Gate College of Law (LL.B.) Member of American, California State, San Francisco and Los Angeles Bar Associations, Insurance Section of American Bar Association; Workmen's Compensation Committee of California State Chamber of Commerce; General Insurance Committee of Los Angeles Chamber of Commerce and the Governing Committee, Pacific Coast Division of National Automobile Theft Bureau. Chairman of California Insurance Companies Co-ordinating Committee. Associated with Pacific Indemnity Company. Member of I.A.I.C. since 1949.

CURRENT DECISIONS

In each issue of the Journal there will be published two or three pages of Current Decisions. These will be brief digests of recent cases of particular interest to insurance lawyers. All members of the Association are urged to participate in this important feature of our Journal.

Reports of Current Decisions should be sent to your State Editor. Full credit will be given to all contributors.

LIABILITY INSURANCE— WHEN DOES COVERAGE COMMENCE?

National Indemnity Company, Inc. v. Smith-Gandy, Inc., 150 Wash. Dec. 109, recently decided by the Supreme Court of Washington, may be said to illustrate a tight squeeze. The plaintiff insurance company brought suit against the defendant automobile dealer seeking a judgment declaring the rights of each party under an insurance policy. This was necessary because a suit had been commenced against the automobile dealer, and the parties wanted to know who was responsible for defending it and who would pay any judgment.

At 3:15 P.M. on June 7, 1955, Smith-Gandy's insurance broker called the National Indemnity Company and asked for insurance coverage on a truck then in transit from Detroit to Seattle. The broker asked that the insurance be effective from the start of the trip. The insurance company refused to back-date the policy, but agreed that coverage would commence at the time of the telephone call and sent a letter confirming that fact. Later when the insurance company's policy was issued, it stated that it became effective at 12:01 A.M. on June 7, 1955.

On the evening of the telephone conversation, Smith-Gandy learned that the truck had been involved in an accident near Minot, North Dakota at 2:15 P.M., one hour prior to the order for insurance. As a result of the accident, an action was commenced in North Dakota against Smith-Gandy for damages totalling $200,000. The insurance company claimed that coverage was dependent upon the telephone agreement and confirming letter showing that coverage commenced at 3:15 P.M., an hour after the accident. Smith-Gandy claimed that the insurance became effective at the time stated in the policy.

The supreme court based its decision on a statute which provides:

> "No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy." R.C.W. 48. 18. 190.

The court ruled that the letter of confirmation, which had preceded the writing of the policy, did not become a part of the policy. Hence, the insurance coverage went into effect at the time stated in the policy. (Contributed by Payne Karr, state editor for Washington.)

* * *

CONSTRUCTION CONTRACT BOND — — LIABILITY NOT ENLARGED BY CONTRACT TERMS

A contractor, engaged by property owners to construct a large warehouse, gave bond to the owners conditioned as follows:

> "That if the principal (the contractor) shall indemnify the obligee (the owners) against any loss or damage directly arising by reason of the failure of the principal faithfully to perform said contract, then this obligation shall be void; otherwise it shall remain in full force and effect."

Laborers and materialmen whose claims were not paid by the contractor, brought an action directly against the surety on this bond, arguing that although the undertaking was in the form of an indemnity bond running to the owners alone, it should be construed in conjunction with the construction contract to which it referred, and that when so construed it evidenced an intention to protect not only the owners, but also unpaid laborers, materialmen and subcontractors of the contractor.

Both sides moved for summary judgment and the trial court granted judgment in favor of the surety. The Municipal Court

of Appeals for the District of Columbia affirmed this decision, saying:

> "A surety's obligation must be measured by the condition stated in the bond, and when the condition is, as here, merely to indemnify the owner against loss or damage by reason of the failure of the contractor to perform, such condition cannot be construed to go further than its terms and give rights to others not mentioned either expressly or by intendment . . . The short answer is, that the bond furnished was not a payment, but merely an indemnity bond." (pp. 159-160, Vol. 132 A. 2d) *Bevard v. New Amsterdam Casualty Company,* 132 A. 2d 157 (Municipal Court of Appeals for the District of Columbia, 1957)

(Contributed by Alexander M. Heron, state editor for the District of Columbia.)

* * *

POLICY COVERAGE– INSURER BOUND BY TORT CASE FINDINGS

St. Paul Mercury Indemnity Co. insured Artukovich Bros. under a public liability policy. Industrial Indemnity Co. insured the same concern under a workmen's compensation policy. Clark, an employee, was injured on the job in an altercation with Vido Artukovich, his foreman.

Clark sued Vido and Artukovich Bros. claiming to be an invitee on the premises. St. Paul defended that suit. Clark also commenced workmen's compensation proceedings, which Industrial defended and the proceedings were dismissed when the Industrial Accident Commission ruled that Clark "did not sustain any injuries arising out of and occurring in the course of" his employment.

Thereafter the third-party suit was tried and the court rendered judgment against Vido and Artukovich Bros., holding that the ruling of the Industrial Accident Board was *res judicata* on the issue of course of employment. Upon St. Paul's refusal to pay this judgment – on the ground that its policy excluded liabilty for an injury to an employee "while engaged in the employment of the Insured"–this declaratory judgment suit was brought. The court held St. Paul liable, saying, "St. Paul will not be permitted to relitigate in this action a question of fact on which the tort judgment was predicated. Ordinarily the insurer is bound by all facts and matters necessarily adjudicated in the original action. *** It is bound by any material finding of fact essential to the judgment of tort liability which is also decisive of the question of coverage." *Artukovich v. St. Paul Mercury Indemnity Co.,* 150 A.C.A. 331, 310 P. 2d 461, decided April 19, 1957, rehearing denied by Supreme Court of California June 19, 1957. (Contributed by Frank J. Creed, state editor for California.)

* * *

POLICY COVERAGE– NOTICE OF SUIT

The preceeding case includes another point. Artukovich Bros. also sued Industrial Indemnity Co. in the declaratory judgment action, claiming that its policy covered, if St. Paul's did not. Industrial defended on the ground that it was not given written notice of the third party suit and that the summons therein was not forwarded to it. The court held in favor of Industrial, saying, "There is a presumption that prejudice occurred. The presumption is not a conclusive one. The burden of proving an excuse for failure to give notice of suit, and to forward the complaint, process and other suit papers to the insurer rests on the insured. *** The failure of Artukovich Bros. to comply with the 'Notice of Injury, Claim or Suit' provision of Industrial's policy is nonetheless a breach notwithstanding the fact the company had notice of the injury and appeared in the proceeding before the Industrial Accident Commission." (*Pottes v. Great American Indem. Co.,* 316 Mass. 155, 55 N.E. 2d 198, 199).

* * *

EVIDENCE– VIOLENT JERK

Upholding the trial court's action in striking from the record plaintiff's description of the manner in which a street car started, as a "violent jerk", the Sixth Circuit says, *per curiam,* that "the description of a jar or lurch as 'quite violent', unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of the specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, is of slight, if of any, as-

sistance in determining the real character of the fact respecting which it is used." *Barnett v. Detroit,* 245 F. 2d 445, decided June 13, 1957.

* * *

LIFE INSURANCE— FAILURE TO DISCLOSE HEART CONDITION

In a case involving a conflict of testimony as to whether the insured made disclosure of his long-standing heart condition when he was examined by the insurer's physician prior to the issuance of the policy, the court set aside a verdict for the beneficiary and entered final judgment for the company. Christenson, District Judge, said:

"Disclosures to an insurance agent which the insured knows are to be withheld from his company do not furnish an excuse for non-disclosure to other agents. *Mutual Life Insurance Company of New York v. Hilton-Green et al.,* 241 U.S. 613, 36 S. Ct. 676, 60 L. Ed. 1202. Verdicts may not be permitted to rest upon mere conjecture and where proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party having the burden of proof. *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819. There is a presumption of intent to deceive from the knowing concealment of material facts unless such presumption is over-thrown by substantial evidence. *Zolintakis v. Equitable Life Assur. Soc. of United States,* 10 Cir., 1938, 97 F. 2d 583, see also *Same,* 108 F. 2d 902. The burden is upon the plaintiff to prove lack of an intent to deceive on the part of the insured. Utah Code Annotated 1953, 31-19-8. While statements to an examining physician are deemed made to an agent of the insurance company, the examiner's testimony with respect to their circumstances and the written report signed by the insured may be impeached only by circumstances having some logical tendency to do so. *Bednarek v. Brotherhood of American Yeoman,* 48 Utah 67, 157 Pac. 884. Under usual circumstances the uncontradicted testimony of a creditable witness may not be arbitrarily disregarded by the trier of the facts and only by reason of evidence which reasonably casts doubt upon such testimony is the rule otherwise, such impeaching circumstances not being shown here. *Cottrell v. Grand Union Tea Company et al.,* 5 Utah 2d 187, 299 P. 2d 622. See also annotation, (*Right or duty of court to direct verdict where based upon testimony of party or interested witnesses,*) 72 A.L.R. 27." *Castagno v. Accidental Life Insurance Co.,* No. C-167-56, U.S. District Court, District of Utah, Central Division, June 3, 1957.

* * *

FAILURE TO SETTLE— MEASURE OF DAMAGES

In this particular case the appellant had issued a standard public liability policy to its insured, the appellee, for the basic limits of $5,000/$10,000 bodily injury, and $5,000 property damage. The insured was involved in an accident, and the insurance company refused to settle the case for $4,000 which was within the policy limits. In the case in chief against the insured, judgment was rendered in the amount of $18,284. While an appeal was pending, execution was levied against the insured's business and it was sold to the judgment creditor for $4,000.

In the action brought by the insured against the insurance company, the jury found that the insurance company had not acted in good faith in refusing to settle the case within the policy limits. The insurance company meanwhile had settled with the plaintiff in the action against the insured for $6,200, plus additional $1,000 for costs of appeal, etc. The jury, in the action against the insured, returned a verdict of $45,000, based upon the value of the insured's business which he had lost because of the execution levied in an effort to collect the judgment in the case in chief. The court stated, "The company contends that the measure of damages is the amount insured was compelled to pay over and above the policy limits. The position seems to be that when the case was settled after appeal and the sale and destruction of insured's business for the sum of $4,000 full restitution was made by returning to him the $4,000. This cannot be the law. If the company in good faith should have settled, Henderson's property was wrongfully sacrificed and he is entitled to full restitution." *Farmers Insurance Exchange v. Henderson,* 313 P.2d 404, decided by the Supreme Court of Arizona, June 26, 1957.

(Contributed by Gordon H. Snow, Los Angeles, California, Chairman of Journal Committee.)

From The Editor's Notebook

In this column, from time to time, the Editor proposes to publish news and views that he believes will be of interest to our members. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed.

Members of I.A.I.C. are cordially invited to submit material for this column. If and when you have views to express on insurance and legal subjects, or when you learn of items of news that you believe of general interest, send them in! As space permits, we'll publish them with credit to you as the contributors.

A SPLENDID program, delightful weather, and 801 enthusiastic members and guests registered for our Thirtieth Annual Convention made the Atlantic City meeting another outstanding event in I.A.I.C. history. The convention proceedings and the open forums are printed in this issue of the Journal

* * *

L. J. (Pat) Carey, with an assist from Milt Albert, authored a parody on a familiar song that was a high spot of the "International Cabaret" at Atlantic City. We print it herewith so our members may memorize it before next summer's meeting at the Greenbrier—

"From the States across the Nation
And from other countries too,
We assemble once a year from near and far.
We're Insurance Lawyers, Trial Men
And Home Office Counsel too,
You can tell we've been admitted to the Bar.

"With the magic of our singing
Of the songs we love so well,
Had a Dream Dear — Too-Ra-Loo-Ral and the best.
We will serenade our Ladies
While life and voice shall last
They'll not let us be forgotten with the rest.

"We're good little men, never lost a case,
Bah! Bah! Bah!
Never ran a claim nor an amb'lance chased,
Bah! Bah! Bah!
Gentlemen lawyers off on a spree
(But) never admit liability.
Lord! Have mercy on such as we—
Bah! Bah! Bah!"

* * *

VANCE V. Vaughan, Brentwood, Maryland, sends in the following interesting report:

"State Farm Insurance Companies came into the writer's office about a year ago with suit papers, stating that a pedestrian was struck and was permanently and totally disabled, that there was considerable evidence of negligence on the part of the motorist and possibly some contributory negligence on the part of the claimant, and that the claimant had a record of arrests for drinking, fighting and being otherwise disorderly for some total of 55 convictions before the injury and then some three arrests and convictions for fighting after the alleged injury, notwithstanding his medical information which showed that he was permanently and totally disabled. We were requested to do the necessary.

"The case came on for jury trial in the Seventh Judicial Circuit of Maryland, i. e., Prince George's County, before Judge J. Dudley Digges. Claimant was represented by one of the leading negligence attorneys of Washington, D. C. The court held that, as stated in 15 American Jurisprudence, 780, Section 341, the law as a general rule was where a claim is made for loss of wages, impairment of earning capacity, or loss of future earnings, facts may be shown concerning the plaintiff's habits or conduct which might throw light on the probability of his securing employment, such as his business and other habits, his habits of economy, etc. Ordinarily in personal-injury actions evidence of the plaintiff's earning capacity and habits of sobriety and industry is admissable. On the other hand, although there is some authority to the contrary, evidence of the plaintiff's intemperate habits is generally held to be admissible as bearing upon his present earning capacity, his probable future earnings, and his expectancy of life. Furthermore, the plaintiff's intemperate habits may account, in whole or in part, for the physical condition and suffering claimed to have resulted from the accident.

The jury brought in a defendant's ver-

dict and there was no appeal.

The divisional superintendent of State Farm Insurance Companies then advised counsel that they were getting in claimants' criminal activities of this nature in various sections of the country and felt that this was the type of defense which should be more fully explored."

* * *

FROM John B. Thurman, Little Rock, Arkansas, author of the article "Recovery by Wife for Loss of Consortium of the Husband", XXIV Insurance Counsel Journal, page 224, comes the following supplemental report:

"Since I prepared the article, there have been a number of developments in connection with this question, the most important of which was the decision of the United States Court of Appeals for the District of Columbia in *Smither and Company Inc. v. Coles,* 242 F. 2d 220, decided February 21, 1957, certiorari denied June 10, 1957, 77 S. Ct. 1299. The court reversed itself, and overruled its prior decision in *Hitaffer v. Argonne Co.,* 183 F. 2d 811, 23 A.L.R. 2d 1366, certiorari denied 1950, 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624, as to the right of the wife to recover for loss of consortium of her husband where Section 5 of the Longshoremen's and Harbor Worker's Act is involved. This case is of utmost importance in connection with the question discussed. Further, the Arkansas Supreme Court in the case of *Missouri Pacific Transportation Company v. Miller,* an opinion rendered in January, 1957, followed the *Hitaffer* case and held that the wife was entitled to recover for the loss of constortium of the husband."

* * *

WE FIND something to think about in the following statements of Dean Joseph O'Meara, of Notre Dame Law School, 43 A.B.A. Journal, 614, 670:

"The complex phenomenon which lawyers know as law is an always unfinished product. It may be compared to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but is constantly adding new patterns and variations on old patterns. Every lawyer, whether on or off the bench, has a part in the weaving of this tapestry and in the process is confronted by an endless succession of questions for which there is no simple, ready-made answer. In every case there are problems of appraisal, evaluation and choice which — whether practitioner or judge — a man must somehow solve for himself. Is this case really comparable to that? Does a certain circumstance present here, not present there, alter the picture essentially or only in an immaterial detail? These authorities present a persuasive analogy; those point just the other way. Always, in short, there is more than one possible outcome pressing for acceptance. A *choice* must be made."

* * *

THE JANUARY, 1958, issue of the Insurance Counsel Journal will be its Twenty-Fifth Anniversary number. By special action of the Executive Committee, we shall reproduce in that issue The Atlas of Human Anatomy—24 exceptional color plates detailing the construction of the human body. This project entails substantial additional expense, but the Executive Committee and the editors are confident that it will constitute a real service to the readers of the Journal.

* * *

WHEN more than 120 American lawyers and their wives were guests at a banquet in the great hall of Parliament House, Edinburgh, Scotland, last August, they heard the Lord Justice-General, Lord Clyde, propose the main toast, that of "The Atlantic Community". He said, in part, "We believe that all persons are equal before the law: that men and women should be free, not slaves of a system, whether it be Communist or otherwise. We believe that the suspected lawbreaker is not guilty till he is proved guilty, and that you do not prove him guilty by torturing him or drugging him or harassing him into an admission which can become the central feature in a sham trial.

"We believe in an independent Judiciary which is not the mouthpiece of any Government or executive authority; we believe in the determination of disputes in the full glare of a publicity not in secret conclave in a back room behind closed doors.

"We believe that the law would disappear as an effective system if it was powerless to castigate the wrongdoer; if it became a mere talking shop, enunciating high-sounding principles without the means or the courage to compel compliance with them.

"In a word, we believe in the Rule of Law; in maintaining and enforcing fair play and justice between man and man. That forms the foundation of our mutual regard and is the essential hallmark of the Atlantic Community."

INTERESTING READING*

DAMAGE TO ESTATE PROPER CONSIDERATION IN DETERMINING WRONGFUL DEATH AWARD

O'Toole v. U. S., C.A.Del·, 242 F.2d 308.

A surviving widow obtained a $400,000 award for wrongful death under Delaware law. Both parties appealed. The United States Court of Appeals for the Third Circuit found that the award was not excessive but reversed the judgment on plaintiff's appeal because the trial judge specifically excluded any reasonably expected accumulations to the estate of the decreased husband which would have accrued had he lived out his normal life span. The appellate court was of the opinion that the statutory language " 'damages for the death and loss thus occasioned' should include a widow's share of what her husband in the remainder of his expected lifetime could reasonably be expected to accumulate as well as what a wife might get as support during that remainder." Opinion by Goodrich, Circuit Judge.

ACTION FOR MALPRACTICE RESULTING IN DEATH GOVERNED BY WRONGFUL DEATH ACT LIMITATIONS

Hachmann v. Mayo Clinic, U.S.D.C. Minn., 150 F. Supp. 468.

Minnesota has a two-year limitation period on actions against physicians and hospitals for malpractice and a three-year period for wrongful death actions. The instant action was based upon alleged malpractice resulting in death and was brought more than two, but less than three, years after death. The United States District Court for the District of Minnesota, Devitt, J., reasoned: "Where death is the result, recovery must be sought under the exclusive provisions of the wrongful death statute." The court added that the two year statute was applicable only to those actions for malpractice resulting in injury.

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LIMITATIONS ON WORKMEN'S COMPENSATION CLAIM RUNS FROM DATE OF ACCIDENT

Rutledge v. Sandlin, Kan., 310 P.2d 950

A workman in the course of his employment sustained a severe blow which several months later necessitated surgical removal of a malignant tumor. In asserting his claim under the Kansas Workmen's Compensation Act, the workman contended that the statute of limitations did not begin to run until discovery of the injury. The Supreme Court of that State, speaking through Robb, J., said that the statute, requiring a written claim to be served within 120 days after the "accident", began to run from the day of the blow, regardless of when the resulting injury was discovered. Fatzer, J., dissented.

MANUFACTURER OF BLOOD PLASMA CONTAINING HEPATITIS VIRUS NOT LIABLE TO PATIENT

Merck & Company v. Kidd, C.A.6, 242 F. 2d 592

A hospital patient was given blood plasma manufactured by defendant and later became afflicted with jaundice, diagnosed as hepatitis. The Tennessee Food, Drug and Cosmetic Act, patterned after the Federal Act, prohibits the sale of adulterated drugs. The evidence showed that the hepatitis virus could not be detected even with the most powerful microscope. In denying recovery to plaintiff, the United States Court of Appeals for the Sixth Circuit, held that the virus was not a "filthy substance" within the statutory definition of "adulterated drugs." Opinion by Stewart, Circuit Judge. McAllister, Circuit Judge, dissented.

PILOT NEGLIGENT IN FLYING INTO STORM

Cudney v. Braniff Airways, Inc., Mo., 300 S.W.2d 412.

Plaintiff, an airline passenger, sustained injuries when she was tossed about inside an airplane which was being flown through

a stormy area. She sought to recover alleging negligence in flying into the storm, in flying at a dangerous rate of speed while in the storm, and in failing to instruct her, as an inexperienced air traveler, that in turbulent weather a passenger or some other object may be so thrown about as to cause the safety seat belt to become unfastened. The case went to the jury which returned a verdict of $20,000 but the trial court entered judgment for defendants notwithstanding the verdict. The Supreme Court of Missouri, Van Osdol, C., held that the evidence presented questions for the jury and reinstated the verdict.

WORKMEN'S COMPENSATION ACT BARS TORT CLAIM OF EMPLOYEE'S HUSBAND

King v. Chrysler Corporation, U.S.D.C.E.D·Mich., 150 F.Supp. 440

Plaintiff's wife received fatal injuries while in the course of her employment and he sought to recover for loss of her services and for her funeral expenses. The United States District Court for the Eastern District of Michigan, Levin, J., granted a motion to dismiss on the ground that the Michigan Workmen's Compensation Act provided the exclusive remedy for the injury and barred recovery by the husband in tort.

NEW YORK ABOLISHES HOSPITAL IMMUNITY RULE

Bing. v. Thunig, 163 N.Y.S.2d 3.

Since *Schloendorff v. Society of New York Hosp.,* 105 N.E. 92, the liability of a hospital in New York for injuries suffered by a patient through the negligence of its employees, has depended on whether the injury-producing act was administrative or medical. The Court of Appeals, speaking through Fuld, J., has changed all this by the following pronouncement: "The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. * * * The hospital's liability must be governed by the same principles of law as apply to all other employers."

INJURY DURING DAIRY WORKER'S BLOOD TEST NOT COMPENSABLE

King v. Arthur, N.C., 96 S.E.2d 846

Dairy workers were required by the county board of health to submit to periodic blood tests. Plaintiff was injured while submitting to such a test and sought an award under the Workmen's Compensation Act of North Carolina. The Supreme Court of that State, speaking through Justice Denny, reviewed the authorities on the point, and concluded that the injury did not arise out of and in the course of the employment, although the test was essential to the continuance of the employment and although the employer, pursuant to its duty under the board of health regulations, had ordered the employee to take the test.

STATUTE OF LIMITATIONS ON NSLI POLICY BEGINS SEVEN YEARS AFTER INSURED'S DEATH

Peak v. U. S., U.S.S.Ct., 77 S.Ct. 613.

A serviceman insured under a National Service Life Insurance policy disappeared in 1943. His beneficiary brought suit in 1954 to recover on the policy and was met by the defenses that insured's death would be presumed to have occurred in 1950, the end of seven years' unexplained absence, in which case the policy had lapsed or, if insured were deemed to have died in 1943, the action was barred by the six year statute of limitations. The United States Supreme Court, in an opinion by Mr. Justice Douglas, stated that the beneficiary's cause of action accrued at the end of the statutory seven-year period since prior to that she could not have successfully maintained her suit and held that the beneficiary on the complaint was entitled to go to the jury to show that death occurred prior to 1950 while the policy was in force. Mr. Justice Harlan, Mr. Justice Frankfurter and Mr. Justice Burton dissented in part.

PROCEEDINGS

30th Annual Convention International Association of Insurance Counsel

CHALFONTE – HADDON HALL
ATLANTIC CITY, NEW JERSEY

GENERAL SESSION

JULY 4, 1957

THE GENERAL Session of the Thirtieth Annual Convention of the International Association of Insurance Counsel convened at the Haddon Hall Hotel, Atlantic City, New Jersey, at 9:30 o'clock A.M., President John A. Kluwin presiding.

PRESIDENT KLUWIN: Members of the International Association of Insurance Counsel, ladies and gentlemen:

The Thirtieth Annual Convention of the International Association of Insurance Counsel will please come to order. If you will all rise, I will ask the Reverend George W. Lawrence, of the Ventnor Community Church of Atlantic City, to give the Invocation.

REV. GEORGE W. LAWRENCE: Oh Holy God, Thou hast been good to us in inspiring men of honesty and integrity to lead us. We pray that we may have strength of character to oppose all corruption in our own hearts and in any part of our government. We pray that Thou will watch over us and guide us in the years that are ahead. Help us to appreciate the opportunities that Thou are giving us in our service in our communities and in our nation. We pray for Thy divine blessing upon every meeting of this Association. May that which is done here be in accordance with Thy will. May we never be afraid of the truth but may we appraise it with reason and not prejudice.

We thank Thee for all the blessings that Thou hast bestowed upon us. Watch over our loved ones, our homes and our nation, and may we have Thy presence to guide us at all times.

We ask this, oh God, because we believe in Thee. Amen.

PRESIDENT KLUWIN: I will recognize Past President Dodd.

MR. LESTER P. DODD: Mr. President, a good and pleasant custom entitles me to interrupt this meeting at this point to present to you a symbol and a token, a symbol of your authority to preside over this meeting and a token of the affection and esteem in which you are held by the members of this Association.

I am about to present to you an intrinsically valueless little chunk of wood, but I do say, with our very best wishes and our deep and warm affection. As you use it here and treasure it hereafter among your precious mementos, may God go with you. [Applause]

PRESIDENT KLUWIN: Thank you. Lester, I want you to know that I accept this gavel with a deep feeling of emotion, recognizing its true value, and it will have a very cherished spot in my office. You may be assured that it will bring back many pleasant memories to me.

I want to say to all of you that for all the things you have done for me and your charity in being kind to me in my infirmities, I am deeply appreciative and thank you very much. [Applause]

In keeping with the established precedent of my distinguished predecessors, I will now entertain a motion to dispense with the roll call and the reading of the minutes of the last convention.

MR. ALVIN R. CHRISTOVICH: I so move.

MR. JAMES A. DIXON: I second the motion.

PRESIDENT KLUWIN: It has been moved by Mr. Christovich and seconded by Mr. Dixon that the reading of the roll call and the minutes be dispensed with. All in favor say "aye"; opposed "no". The motion is carried.

It is our good fortune today to have with us the first citizen of Atlantic City, a gentleman who has performed the function which he is about to undertake many times. He was born in Yonkers, New York, in 1891 and graduated from high school

here in Atlantic City. He spent his undergraduate days at the University of Pennsylvania and is a graduate of Dickenson Law School. He served his country in the United States Navy in World War I. He has served in the state assembly and has been county prosecutor, city commissioner and, since 1944, has been the mayor of this city.

It is my distinct privilege to present to you at this time the Honorable Joseph Altman, Mayor of Atlantic City. [Applause]

Address Of Welcome

HONORABLE JOSEPH ALTMAN

Major of Atlantic City, New Jersey

THANK you very much, Mr. President. Ladies and gentlemen of the bar:

I have been in public life for a good number of years. I don't get the impression that I am a great person or, as our teenagers might say derogatorily, that I am a brain. We have a darn good political organization; that is the reason for my continuance in office.

From the standpoint of appealing mostly, when I was actively practicing on the plaintiff's side of the case, I don't think I will give you our usual very cordial greeting to Atlantic City. [Laughter] You gentlemen are practically all defense counsel.

However, representing my city and our people, we appreciate your coming and I trust you will enjoy what we have to offer here.

Very briefly, not to usurp your time, we are a city of about 65,000 permanent population. As such we are geared up municipally to run a city of a fluctuating population of 250,000 at a peak on summer weekend days. You can understand the perturbation one has in public life running a city of this sort, when our tax bills are presented to the taxpayers, considering the extraordinary reaches of a city such as this seashore resort.

We have an unparalleled boardwalk that you might have walked upon, nice stores, fine hotels, and we don't think there is a place in the nation or the world equal in its uniqueness from the standpoint of walking undisturbed, pleasantly, with no cross traffic, next to, or alongside of, the Atlantic Ocean intervened by spacious, white, glistening, sandy beach. We think we are a fine town and we think so advisedly and justifiably.

I now present to your president another memento to be placed with his trophies, a beautiful souvenir key. Mr. President, this looks like gold but don't get excited, it's not. [Laughter] It has cost our taxpayers a lot of money, I think, including the case, about five dollars; but it does make a nice souvenir, sir, and we are very discriminatory about it, about 500 we have given this year. [Laughter] But I hope you take it and cherish it as a memento of this convention when your Association is here in Atlantic City and the pleasures you have here, sir, with the good wishes of our citizenry.

Likewise, may I make of you a special detective of Atlantic City. This is a replica of a police badge. To all intents and purposes you are now a policeman of the city of Atlantic City, but, if you happen to violate any of our traffic laws for instance, pay no attention to the summons; just disclose this badge to the police officer, and you will be arrested very quickly and your fine will be more grievous. [Laughter] From the standpoint of pride, I won't tell you what one of my friends suggested I do about these badges. [Laughter]

I want to thank you for coming. Come again! This is a nice town. Bring your family. Don't make it particularly to a convention; come at any time of the year and you will like what we have here. Thank you very much. [Applause]

PRESIDENT KLUWIN: I think from the remarks of his honor you can readily understand that he has a lot more to offer the citizenry of Atlantic City than just a good political organization.

For the response on behalf of our Association, it is my good fortune to obtain the consent of one of our distinguished Flori-

da members. He has been a member of this Association since February 24, 1948, and has been described by one of his contemporaries and perhaps, and, I quote, "competitor," although we do not like to use that term in describing our brethren at the bar, as, and I quote, " a fine boy, a good lawyer." I might add that he is a most gracious host and he is also described by ladies in attendance at our meetings as our most handsome member.

I present to you Walter Humkey of Miami, Florida. [Applause]

Response To Address of Welcome

WALTER HUMKEY
Miami, Florida

THANK you John. Mr. Mayor, since you addressed us as gentlemen of the bar, I can no longer hold from you the fact that I am a lawyer. Being a lawyer, about the only speaking I ever do is in the courtroom, where I start my speeches with "Your Honor." I don't know of a more appropriate way to start this response.

When John called upon me to make this response I was somewhat reluctant to accept the assignment. Being a Miamian, I hated to publicly announce and recognize the fact that Atlantic City is a great resort center. There is some thought that there is a little competition between this city and the one from which I come.

Upon slight reflection, of course I realize that Atlantic City has something that we could never take from it. Your great reputation has built up over the years and I am sure you are going to retain it.

We wish to congratulate you, Mr. Altman, for the splendid services which you have undoubtedly rendered to this community, resulting in your having been elected as mayor and leader of this great community. We, of this convention, were particularly happy that our President John and his Executive Committee selected your city as the site for this convention. We are happy to be here to enjoy that great, white beach of yours and that tremendous boardwalk of which we have heard so much, and the other facilities which you have offered for our pleasure at this meeting. Because of these facilities and your very warm and cordial welcome, and because of the tremendous hospitality that we have experienced up to this time and know that we will throughout this meeting, I can assure you that our visit here will be one of great pleasure. When we leave reluctantly at the end of this meeting, we will take with us warm feelings of a great city. [Applause]

PRESIDENT KLUWIN: Thank you, Walt.

I think I can best introduce the next speaker on our program by a short story. It has been my pleasure to have been associated with this gentleman for over a quarter of a century. He picked me up off the street, and I am deeply appreciative of everything he has done for me. If it weren't for him I wouldn't be here today.

I attended my first meeting back in 1938 up at the Grand Hotel at Mackinac Island. When he made arrangements for me to go I was a bit disturbed because I thought, "How can I ever get along with those wonderful people?" I said, "They are completely out of my class." But he best described it by a story that I am just going to relate for a moment.

It seems that a fellow had a horse. It wasn't much of a horse, but he got together enough money to enter him in the Kentucky Derby. One of his friends heard about this and he said, "You don't expect your horse to win that race?"

He said, "No, but he certainly gets to know a lot of damn fine horses."

It is my pleasure to know a lot of wonderful people in this organization since I attended my first meeting back in 1938. One of our most distinguished members is the past president, who is going to introduce our new members. I present to you my law partner, Gerald Hayes! [Applause]

MR. GERALD P. HAYES: Mr. President, the Committee on Reception of New

Members consists of Mr. Alvin Christovich of New Orleans, Lester Dodd of Detroit, Mr. J. A. Gooch of Fort Worth, Duncan Lloyd of Chicago, Stanley Morris, Charleston, West Virginia, Joseph Spray of Los Angeles, Wayne Stichter of Toledo.

(Thereupon the new members were called to the front of the hall.)

I wish you to stand right where you are, gentlemen. You have been admitted to membership in one of America's finest professional groups. Your blue badges attest that you have successfully surmounted a rigorous examination as to your professional qualifications, your standing at the bar, the nature and extent of your business in the field of insurance law, and your worthiness as gentlemen. We also welcome your ladies. The success of our society depends upon the wholesomeness of our work for the organized bar and the insurance industry, but those of us who have had experience with the arranging and conduct of our annual meetings will readily admit that their success has been generated and established by the aura of loveliness about our assemblies by those who are even much more than our better halves. So, gentlemen, make it a must to honor these meetings with your ladies. You will honor her and she will honor us.

I have one more suggestion, and I wish you would turn around and look at me. A number of us are wearing our badges with silver stars, denoting membership of more than 25 years in this Association. We want you to be considerate of us with a convincing demonstration of your respect and heartfelt sympathy for age and creaking joints and ever-increasing syndromes of senility. [Laughter] It could very well be a libation offered to the oldsters at any time during the convention and in any given amount. [Laughter] And to those of us who are privileged to wear the red star on our badges, three or four similar treatments will suffice. [Laughter]

We bid you welcome and we wish you well. You gentlemen and the others who have recently been admitted to our ranks are our future life's blood of the International Association of Insurance Counsel. Thank you very much. [Applause]

President's Report

JOHN A. KLUWIN

Milwaukee, Wisconsin

WHEN MY distinguished predecessor, Mr. Dodd, presided over our 29th Annual Convention at The Greenbrier last July, he quoted from Section 1 of Article X of the By-Laws of this Association which prescribes the duties of the President, among which is the following and I quote: "He shall deliver an address at each annual meeting." Mr. Dodd went on to state:

"I propose to borrow a device that I believe has saved the Congress of the United States from extinction through asphyxiation; namely, that of extension of remarks in the Journal. I shall submit to the able Editor of our Journal a document entitled, 'The Vanishing Tribe,' which should he find printable and which, should any of you find time to read, you may regard as the President's address."

My immediate reaction was one of great relief, not because we were being spared from an address which, of necessity, would be worth while because in my book Mr. Dodd can do nothing inferior, but because I thought he had given me a plan which I, though guilty of some form of plagiarism, might follow. Imagine my chagrin I received the July, 1956, issue of our Journal and read his thought provoking discussion entitled, "The Vanishing Tribe." I immediately abandoned the thought that I could produce such a document.

It has always been my opinion that one should speak only about something within his own knowledge. When I took counsel with myself, I soon came to the inevitable conclusion that my field was definitely limited and that I should confine my remarks to the history and development of the I.A.I.C. This subject was ably covered up to 1951 by Past President Stichter, but perhaps I can make some observations

from a different viewpoint for the benefit of our new and older members which may serve to supplement Mr. Stichter's review.

It is historically significant that this Association was conceived thirty-seven years ago this month in the mind of the general counsel of an accident and health insurance company. There was a two months' period of gestation and birth took place right here in Atlantic City in September, 1920. Like a prodigal child, it has taken us thirty-seven years to return to the city of our birth as a full-fledged virile organization.

The eleven original founding fathers consisted entirely of general counsel of accident and health insurance companies who joined together under the organization title of "The General Counsels' Association of Accident and Health Companies."

By 1921 when the next meeting was held at West Baden Springs, Indiana, the group had increased to approximately twenty members. I am unable to find any record of another meeting until one held on September 16, 1925, at Montreal, Canada, a date of special significance to me because it was my eighteenth birthday and the day when I attended my first class as a green freshman at Marquette University. I can safely assume that the Executive Committee of this Association was not aware of these momentous events and of the part they would play in the future history of this Association.

The next meeting was at Swampscott, Massachusetts, in September, 1926. At this meeting it was decided to invite the general counsel of casualty companies to join. In September, 1927, when the Association met at Toronto, Canada, the members voted to change the name to "International Association of Insurance Counsel," and it was also decided that consideration should be given to changing the by-laws to provide for the admission of private practitioners who specialized in insurance work, and a committee was appointed to study the problem.

By this time the Association's membership had increased to forty-five. Within a year when the next meeting was held at Old Point Comfort, Virginia, in September, 1928, the membership had grown to 207, and in the following year had increased to approximately 435.

At the September, 1930, meeting at Ottawa, Canada, it was voted to permit the Insurance Bar to insert an Association application blank in each copy of its insurance directory. No such easy access to our application blanks is available today!

By 1932 the membership had increased to 1,041 when George Yancey recommended that a monthly bulletin be sent to the members. A committee was appointed to investigate his proposal. Arthur G. Powell was chairman of this special committee and reported favorably to the convention at Chicago in 1933, and, thus, our Journal was created. George Yancey became our first Editor and breathed life into this worth while project. He nursed the Journal through infancy, guided it through adolescence, and ushered it into adulthood until 1955, a period of twenty-two fruitful years. We owe George Yancey a debt we can never repay. I am sure that as Editor Emeritus he glows with pride as he watches his brainchild continue to grow and improve under the able editorship of his first successor, our second Editor, William Knepper. The first issue of the Journal was distributed in April, 1934, the second in July of the same year. Four issues a year have been published ever since.

Let us proceed more rapidly. March 15, 1949, means more to me than just the last day in 1949 for filing my federal income tax return. It was on that day that I became y o u r fourth Secretary, an office which I held until July 9, 1955, when you honored me by selecting me as your President-Elect. By custom and common understanding, a secretary or treasurer is not to hold office for more than five years. However, at the end of my five years I was urged to stay on for another year because we were in the stage of a gradual transition over to an Executive Secretary, a change which has been most beneficial for this Association. Frank O'Kelley succeeded me, and from the excellent way he has handled the office of Secretary, any necessity for my continuance in office for an extra year may be facetiously described best by a story. A brother took his younger brother to see a psychiatrist and explained that the ailing brother thought he was a hen. The doctor inquired as to how long the brother had exhibited these symptoms to which question the older brother replied, "Approximately eight months." The doctor was amazed and exclaimed, "Why didn't you bring him in here sooner?" to which the older brother replied, "We couldn't. We needed the eggs." I hope I

didn't lay too many!

Again this year one of our distinguished members, our Treasurer, Charles Pledger, completes his fifth term, and again we are faced with the problem of whether it would be better for the Association to have him serve another year while we are completing the transfer of the Treasurer's clerical duties to the office of the Executive Secretary or to select a new successor. I am confident that the Nominating Committee, with your help, will have a solution for us when it reports next Saturday morning.

I am taking this opportunity to make a few personal observations about our profession and the industry which we represent.

I am proud to be a lawyer and to have had the privilege for twenty-seven years to represent the insurance industry which I feel has made and will continue to make valuable contributions toward the happiness of our people and the continued prosperity of our country. It is reasonable to assume that at times you have, even as I have, become temporarily disheartened by the fact that by the very nature of the defense of litigation we are denied the glamor, the color, and the natural sympathetic appeal which attends the representation of the badly injured but ofttime extremely negligent plaintiff. Aided and abetted by television shows, large awards are now commonplace in the trials of negligence cases so that juries are becoming educated to figures which are out of proportion to true values. We cannot resort to the sparkling and flamboyant tactics so readily available to the opposition, but before we commit error by unreasonable criticism, let our appraisal of the situation be fair. Just because our task may have become more difficult because plaintiffs are now being represented by ably trained lawyers, that is no just cause for complaint from us. We will become stronger in proportion to the strength of our opposition. Let us accept the challenge and not be complacent, the most dangerous fault to which we can fall heir. Remember that the most potent weapon we have is sincerity. If we are not sold as to the merits of a client's cause, we cannot hope to sell it to a court or a jury. Do not fear to make concessions where it is proper to do so. To be more specific, admit liability where it exists. Let us always be the champions of our jury system because the strength of our democracy will ever lie within our people, and may they ever be the leveling influence as they have been in the past.

Someone has defined a good lawyer as one who is able to step into his client's shoes and walk in them. I would amplify this by stating that a good lawyer is one who is able to step into his client's shoes and walk in them with honor.

Defeat is disheartening, but takes solace in the thought that having prepared and presented your case to the best of your ability, you have performed your duty toward your client, the court, and yourself. If you have been derelict in any respect, take counsel with yourself and resolve never to let it happen again.

In closing, I want to thank you all for having given me the opportunity to serve you for a little over eight years. It is my fondest hope that I have found in the heart of each of you a small abode as each of you has in mine. Thanks for having made my life a happier one. [Applause]

At this time, it is my pleasure to present to you our very efficient Secretary, A. Frank O'Kelley, who will present his report.

Report of The Secretary

A. Frank O'Kelley
Tallahassee, Florida

THIS brief report will add one more chapter to the report of your President.

At the close of our meeting on July 12, 1956, there was an enrollment of 1615 members. Since that time we have welcomed into the Association 107 new members.

During the year there have been 30 resignations and 4 names have been dropped from the rolls as delinquents. We have learned of the death of 17 of our members.

At the time of this report, our total membership stands at 1671, a net increase since our last meeting of 56.

During the year there were processed 132 applications for membership. At this time there are being processed 14 additional applications.

Six of our members have been distinguished by appointment to the bench during the year. These are:

Robert H. Anderson — Miami, Florida

Edward J. Ascher — Freehold, New Jersey

Edmund W. Hening, Jr. — Richmond, Virginia

Wm. J. Jameson — Billings, Montana

John J. Sirica — Washington, D. C.

Culver Smith — West Palm Beach, Florida

This has been another very pleasant year as your Secretary, and I cannot close without saying, "Thank you" to our President, John Kluwin, the other officers, and the members of the Executive Committee and to our efficient Executive Secretary, Miss Blanche Dahinden.

PRESIDENT KLUWIN: Thank you, Frank.

I think our members are as pleased as I am to realize the substantial number of our members who, at personal sacrifices to themselves, have been honored in taking positions on our benches, both state and federal.

It has been my pleasure to know the next speaker since May 1, 1949, when she came to work for, and with, me. I have had the highest regard for her qualifications as a secretary and as a lady. I would be the last one to speak critically of her. However, in the words of the Happy Warrior, the distinguished Al Smith of New York, let us look at the record.

At our meeting in July, 1955, in speaking to you she stated, "If any of you get down to Milwaukee I know you will come up to the office and see me. It will be a new experience for me to be working alone and probably, in no time at all, I will be talking to myself, so I will be very happy to have visitors at the office at any time."

When she reported to you at the Greenbrier last year, she said, "I have a larger apartment in a nicer neighborhood. [Laughter] I have a new refrigerator. I have a television set."

Now, I am not suggesting that there was any connection between the two quotations taken out of context. [Laughter] All that I can say is that our Executive Secretary operates that office in commendable fashion. It is my privilege to present to you this morning Blanche Dahinden, who will present her report. Blanche, will you come forward? [Applause]

Report of The Executive Secretary

MISS BLANCHE DAHINDEN
Milwaukee, Wisconsin

THANK you, Mr. Kluwin, for those nice words.

I was hopeful that my talking to you last year wasn't going to set any sort of precedent, because, believe me, it took ten years off my already half-spent life. Apparently it did set a precedent because here I am again.

I hoped to have a story to tell you to ease my jitters and get you in the palm of my hot, shaking fist at this point, but Mr. Kluwin filched the one I was going to use. [Laughter] He didn't actually filch it because he told it to me originally, but then he took it back to use in his own talk and wouldn't let me have it. So I am left without a story to tell.

My usual source of supply, the president of my college, failed me this year. At our reunion last month he gave an earnest dissertation on educating the modern woman from the standpoint of (a) Why bother to educate her at all? and (b) If she must be educated, why send her to a woman's college? There was no humor in him, believe me. [Laughter] He was in dead earnest, so, as a result I have no story to tell.

I told you last year about my duties. None of you at that time knew how I spent my time or how I earned my salary, but now you do know. I had a lot to talk about last year but this year I don't have very much because there isn't much to add.

However, you might like to know my personal reaction to the two highlights of the year for me, my trip to Washington in December and the mid-winter meeting in Florida at the end of January.

I went to Washington in December in fear and trepidation to learn the intricacies of keeping the Association's books — book, I should say, one huge ledger. I am no bookkeeper. When I add two and two I get five. In fact, when I asked the Executive Committee for an adding machine when my office was set up, I said I wanted just a simple, little adding machine, no complicated contraption that divides and subtracts and multiplies, because I was sure I would never be able to manage it. Do you know what they said to me? They said, "If that is all you want, we will get you an abacus," one of those Chinese things where you push little counters back and forth in order to arrive at the total. [Laughter]

However, after spending two days in the office with Mr. Pledger in Washington and working with the girl who kept the books for the Association, I felt much better about the whole thing and I even had a glimmer as to how to be a bookkeeper

Since then, I have had no difficulty, you will be happy to know, yet, but I have the annual audit still ahead of me on the first of November. But I no longer have a feeling that I will probably wind up in jail as a result of it.

It is always understood when I go anywhere that there must be time for sightseeing. I am a great believer in seeing everything I can along the way because I may not pass that way again. After the business at hand I had a wonderful sightseeing day in Washington. Beryle Pledger and Phyl Galiher picked me up at eight o'clock in the morning and we took off on a sightseeing day which lasted until late afternoon. They were marvelous guides. They knew everything I was supposed to see. They knew exactly where it was and we would drive up to a building and Phyl and I would jump out and gallop through the building and look at everything I was supposed to look at and emerge at the other end of the building and there would be Beryle sitting in the car waiting for us, placidly writing Christmas cards. You name it in Washington and I saw it in that one day, a birdseye view of the city from the top of the Washington Monument, Arlington Cemetery and the Lee Mansion, the Lincoln Memorial. I toured through the White House, which was a particularly lovely time to go because it was all decorated for Christmas, with huge pots of poinsettias everywhere and Christmas trees in all the parlors.

Then we had a tour of the Capitol and the ladies finally turned me loose late in the afternoon at the Smithsonian Institute, by which time I was so full of history and weariness that all I could do was look at the inaugural gowns of the first ladies and Lindbergh's plane and stumble back to my hotel.

I had a lovely time at the mid-winter meeting. The swimming was the best part of all. The temperature of the water was 75 degrees in January, which is warmer than Lake Michigan ever gets even on the balmiest days in late August. When I left home a couple of days ago the water temperature of Lake Michigan was 50, which is cold enough to turn up your toes and turn you red as a beet. I crowded a swim into every possible moment, even before breakfast. About 15 of us met on the beach each morning about eight o'clock for a dip before breakfast, out of which grew a very worthy organization called The Eight O'Clock Clean Living Club. [Laughter] While we never actually got around to electing officers, in correspondence with me following the mid-winter meeting, Mr. Dodd assumed for himself the title of President of the Eight O'Clock Clean Living Club, which just goes to show, once a president, always a president.

I missed two very nice trips because I couldn't tear myself away from that lovely ocean, an afternoon at Hialeah and a boat trip around Biscayne Bay.

One afternoon Mr. and Mrs. Stichter and Mr. Carey and I went to the Seaquarium, a place where they keep samples of all the weird fish that live in that area. I must admit, after seeing them, that I was a little uneasy about my swimming because if I had met any one of them face to face I know I would have gone to the bottom like a stone and stayed there.

The thing that I enjoyed most was the Shark Channel, a round, huge cement-lined channel with a little park in the center. It was perhaps about 30 feet wide and these immense sharks just swam round and round in it while you stood along the sides and looked down at them. While I peered at them, they fixed me with a glassy eye and thought what a tasty dish I would make if the railing would suddenly give way and I would fall in.

We also saw performing seals and porpoises and all sorts of beautifully-colored tropical fish, but the sharks simply fascinated me.

In this report I might give you the impression that my life is just a bowl of cherries and all I do is live from one meeting to the next. However, I can assure you I do get my work done. I do have some very busy times during the year. Everything ran smoothly in my office this year and, of course, having the president in the same city with me was a great help.

So far, Mr. Betts has been very pliable and has performed with dispatch everything I have told him to do. [Laughter] However, if I should find that, in the future, he becomes obstreperous or that the great distance involved becomes a barrier to the accomplishment of my various duties, I might just pack up and take off to Los Angeles and move in with him and crack the whip in person instead of through the mail. [Laughter]

The Executive Committee has been very cooperative and patient with me and my shorthand. I worry about my shorthand. I don't use it at all any more except for the Executive Committee meetings. I don't like the idea of losing a skill that I worked long and hard to acquire. I don't know, I might be able to get a supplementary job working nights for a lawyer who spends his days chasing ambulances. [Laughter]

This is all I have to say to you now, but I do want you to know that I still love my job and I still, bless your hearts, love all of you. [Applause]

PRESIDENT KLUWIN: Thank you very much, Blanche.

I don't know what lawyer in Milwaukee she has been talking to, but lest there be any question that she might be speaking about me for a job, I want to assure you that I will never be charged with being an ambulance chaser. If I can't be out in front I don't want to be there at all. [Laughter]

The next report is by a man who has given valiant service to this organization for five long years. I present to you at this time Charles E. Pledger, Jr., our treasurer. [Applause]

Report of The Treasurer

CHARLES E. PLEDGER, JR.
Washington, D. C.

REPORTING to you as Treasurer for the fifth consecutive year, I am pleased to announce that the financial condition of our Association is excellent. [Applause]

Since my election to this office at the Lake Placid Convention in 1952, there has been a complete transformation in the handling of the details of the financial affairs of the Association. Beginning with the fiscal year starting November 1, 1955, the billing of membership dues and Journal subscriptions and the collection thereof were placed in the office of the Executive Secretary. At the Twenty-ninth Annual Convention last year at The Greenbrier, I recommended the transfer of the remaining detail work of the Treasurer's office to the Association's office in Milwaukee. This recommendation was adopted by the Executive Committee. Consequently, after the audit for the fiscal year ended October 31, 1956, all the books of the Treasurer's office were turned over to the Executive Secretary and are now kept in her office. Accordingly, the duties of the Treasurer now comprise principally the signing of checks on the Association's main account and acting in a policy-making capacity as regards the finances of the Association.

The creation of the office of Executive Secretary has centered the detail operations of the Association in one place. The efficiency of our organization has been improved thereby. Miss Blanche Dahinden is doing an excellent job in directing that office and deserves the commendation of our Association. I personally wish to express my appreciation for her helpfulness to me and the office of the Treasurer over the past year. She has performed willingly and capably every task assigned to her.

The attached statement reflects the detailed financial operations of our Association for the period from November 1, 1956 through June 15, 1957.

It has been a real pleasure and privilege

to serve the Association, in my capacity as Treasurer, over the past five years. I have enjoyed working with the individual officers and members of the Executive Committee during that period. I pay special tribute to the Presidents under whom I have served, each of whom, in turn, has been an outstanding leader and made a substantial contribution to the welfare of our Association. Specifically, I thank Alvin R. Christovich, J. A. (Tiny) Gooch, Stanley C. Morris, Lester P. Dodd and John A. Kluwin for the inspiration which they have given me. I bow out of office with a deep sense of gratitude for the many fine friends I have made in the ranks of this Association during my terms of office.

Report from November 1, 1956 through June 15, 1957

Balance as at October 31, 1956:

Cash:				
Checking Accounts:				
Marine National Exchange Bank, Milwaukee, Wis.			$17,110.61	
Marshall & Ilsley Bank, Milwaukee, Wis.			1,000.00	
Savings Accounts:				
National Savings & Trust, Washington, D. C.			10,467.73	
Second National Bank, Washington, D. C.			10,100.00	
Investments:				
United States Savings Bonds:				
Series K				
V-26258-K—Maturing Feb., 1966		$ 5,000.00		
V-26952-K—Maturing Feb., 1967		5,000.00		
V-26953-K—Maturing Feb., 1967		5,000.00	15,000.00	$53,678.34
Receipts:				
Dues, 1957		$40,075.00		
Journal:				
Subscriptions	$1,947.50			
Binders	1,000.00	2,947.50		
Admissions Fees		1,850.00		
Interest:				
Natl. Savings & Trust	117.72			
Second National Bank	203.00			
U. S. Savings Bonds	207.00	527.72		
Convention Registration Fees		6,479.83		
Miscellaneous		6.43	51,886.48	
Disbursements:				
Treasurer's Office Expense		25.81		
Exec. Secretary's Office Expense		5,681.85		
Journal Expense:				
Publication Cost	11,480.04			
Binders	155.06	11,635.10		
Admission Fee Refunds		550.00		
Convention Expense		42.60		

Mid-Winter Meeting Expense	7,194.44		
Auditing Expense	165.00		
Miscellaneous	642.81	25,937.61	
Excess of Receipts over Disbursements			25,948.87
Balance as at June 15, 1957			$79,627.21

Accounted For as Follows:

Cash:		
Checking Accounts:		
Marine National Exchange Bank, Milwaukee, Wisconsin		$10,258.93
First Wisconsin Natl. Bank, Milwaukee, Wis.		2,479.83
Marshall & Ilsley Bank, Milwaukee, Wis.		1,000.00
Savings Accounts:		
National Savings & Trust, Washington, D. C.		10,585.45
Second National Bank, Washington, D. C.		10,303.00
Union Trust Company, Washington, D. C.		10,000.00
Natl. Metropolitan Bank, Washington, D. C.		10,000.00
Riggs National Bank, Washington, D. C.		10,000.00
Investments:		
United States Savings Bonds:		
Series K		
V-26258-K—Maturing Feb., 1966	$ 5,000.00	
V-26952-K—Maturing Feb., 1967	5,000.00	
V-26953-K—Maturing Feb., 1967	5,000.00	15,000.00
		$79,627.21

PRESIDENT KLUWIN: We all owe Charlie a great debt of gratitude for the tremendous service which he has performed in the past five years for this Association. Lest you be misled by the excellent financial statement we have, I can only add this statement: I can well remember the day when we had to worry not about thousands, as Charlie talks about, but about the pennies out in the extreme right hand column.

It is only because of the fact that we have men in this organization who give so generously of their time and talent. If we had to pay for that type of service, I am afraid that our report would look like that of our national government, well in the red.

At this time, I wish to present to you a gentleman who took over for one of the greats of this organization and who has performed yeoman service to do a better job of one of the best jobs. I present to you William E. Knepper, Editor of our Journal. [Applause]

Report of The Editor

WILLIAM E. KNEPPER
Columbus, Ohio

YOUR editorial staff is happy to report that the Journal has had another good year. Splendid articles have been supplied by the State and Regional Editors and by the standing committees. We are continuing our efforts to keep the Journal the outstanding publication that George Yancey made it during his many years as its Editor.

The July issue of the Journal is on the

press right now. It will be delivered to your offices within the next two weeks. In addition to some especially fine articles, this issue inaugurates a new feature, "Of Law and Medicine", in which we shall emphasize medicolegal subjects. We hope you like it and we solicit your suggestions and criticisms.

The proceedings of this convention will appear in the October issue. Next January, the Journal will publish issue number one of Volume Twenty-Five — its Twenty-Fifth Anniversary issue. With your help, that issue and all to follow it will continue to maintain our objective of publishing the best articles on insurance law and practice that can be found anywhere.

And now, Mr. President, following the custom established by our Editor Emeritus, George W. Yancey, it is a pleasure to present to you a complete set of bound volumes of the Journal. All but the last volume have been shipped to your office. This one I now hand to you in token of our grateful appreciation of your faithful service to this Association.

PRESIDENT KLUWIN: Thank you very much, Bill. So much has happened here this morning. I thought this was the Fourth of July. From what has happened here I think it is the 25th of December because I have certainly received some wonderful gifts that I will cherish throughout my life.

I think all of you appreciate the great value of the Journal in your offices. I had occasion only last week to get out an opinion on the words "accident" and "occurrence" and whether there was a distinction and a difference. When I began my research I found that there was practically nothing on the subject except in our Insurance Counsel Journal, in which I found four different excellent articles. I am sure that that has been the experience of all of you.

I now recognize our President-Elect, Forrest A. Betts, for the purpose of proposing an amendment to the By-Laws of this Association.

Amendment To By-Laws

Presented by FORREST A. BETTS
Los Angeles, California

Mr. President, members and guests. At the request of your Executive Committee, I propose that Article III of the By-Laws of this Association be amended to read, as follows:

Article III

Qualifications for Membership

Any person who is and, for at least eight years prior to being nominated for membership, has been a member of the bar of the court of last report of a State, Territory or Possession of the United States of America or of the District of Columbia or of a Province of the Dominion of Canada or who is and, for at least eight years prior to being nominated for membership, has been a member of the bar of the court of last resort of any Country in the Western Hemisphere, and who is actively engaged in the practice of law within the territory comprising any of the political units enumerated above in this Article, and is of high professional standing and who devotes and has devoted for five years preceding his application for membership a substantial portion of his professional time to the representation of Insurance Companies:

(a) in the handling as legal counsel of litigated cases, or

(b) in dealing with the general legal problems involved in the home office administration of such companies, or

(c) as a full-time member of the legal staff of an industry association of Insurance Companies of nationwide or regional scope,

and who shall meet such further requirements and qualifications for membership as the Executive Committee may from time to time prescribe, shall be eligible to membership in this Association upon nomination and election in accordance with these By-Laws; provided, however, that service on the bench or as a public official engaged in the supervision or regulation of the insurance business for all or any part of the five years immediately preceding an application for member-

ship shall satisfy, pro tanto, the foregoing five year prior experience requirement.

For your information, the portion of that article which is amended is quite brief. It is the phraseology occurring twice, which says:

"for at least eight years prior to being nominated for membership."

The purpose of the proposed amendment is quite simple. It is merely to make more definite a borderline situation and to straighten out a problem that is of minor significance actually, but which will permit the Executive Committee to function more accurately in the discharge of duties in determining some of the cases that heretofore have been borderline.

It is the feeling of the Executive Committee that during an eight-year period it is probable that the five-year requirement will be more accurately complied with if this amendment is adopted.

Therefore, on behalf of the Executive Committee, and as their representative for this purpose, I move you, Mr. President, that the amendment be adopted.

PRESIDENT KLUWIN: You have heard the motion. Do I hear a second?

MR. DIXON: I second the motion.

PRESIDENT KLUWIN: It has been moved by Mr. Betts, seconded by Mr. Dixon, that the proposed amendment be adopted. Do you wish any discussion? Hearing none, all in favor indicate by saying "aye"; opposed "no." The motion is carried.

I haven't had an opportunity to check with all of these men to determine whether or not they are present here this morning, but I feel that it is only fitting and proper that we in convention assembled take official recognition of the tremendous service which the chairmen of the various committees have performed for this organization. As I call their names in connection with their respective committees, I would appreciate these men, if they are present, if they would kindly stand. I also ask that you defer any applause until I have completed presenting them. The reason I do that is — it presents no problem to me — they are very sensitive to your applause and for future presidents it involves some labor relations in connection with compensation as dependent upon your applause. In other words, they are all conscious of their rating and try to take advantage of that situation.

At this time, I present the chairman of the Accident and Health Committee, Lowell L. Knipmeyer.

I know that the chairman of the Automobile Insurance Committee isn't here. He couldn't be here because of previous commitments, but he has performed a valiant service, Walter Ely.

The chairman of the Aviation Insurance Committee, George I. Whitehead, Jr.

The chairman of the Casualty Insurance Committee, Harley J. McNeal.

The Convention Site Committee, G. Arthur Blanchet.

The Federal Rules of Civil Procedure Committee, Josh Groce.

Fidelity and Surety Insurance, Arthur A. Park.

Financial Responsibility Insurance, Marcus Abramson.

Fire and Inland Marine Insurance, Thomas M. Phillips.

Home Office Counsel, Milton A. Albert.

Industry Cooperation — I know he isn't here because he wrote me and said he couldn't be here — our past president, Stanley C. Morris.

Journal Committee, Paul F. Ahlers.

Life Insurance, Harold A. Bateman.

Malpractice — a man from my own city and I know he couldn't be here — E. H. Borgelt. You will find his report in the Journal.

Marine Insurance, Stanley B. Long.

Membership Eligibility, Paul J. McGough. Paul couldn't be here. He just had a serious operation recently, but he still hopes that he can go to Europe.

The Memorial Committee, F. B. Baylor.

Open Forum and Panel Discussion, Kraft W. Eidman.

Practice and Procedure, William A. Kelly. I had a letter from Bill. He couldn't be here because he, too, has been ill in the past few months.

Workmen's Compensation and Unemployment Insurance, George Schlotthauer.

Ladies and gentlemen, these are the men who head the committees, who really make this organization. We owe them a big hand. [Applause]

Our principal speaker this morning is truly a man of letters. He holds an A.B. and an L.L.B. degree from the University of Mississippi and a J.S.D. degree from Yale University. He has been a high school principal, a private practitioner, the mayor of Oxford, Mississippi, and its city attorney, a professor of law at Tulane University, and he is presently the dean of the

University of Mississippi. He has taught, among many subjects, agency, insurance and torts. He has been a contributor to the Yale, Mississippi and Tulane Law Journals. He has been a member of the Uniform Laws Commission and he was president of the Mississippi Bar Association in 1954-'55.

He will speak to us this morning on the subject, "The Meaning of Not Meaning" and I think he's a meany because he has refused to tell me what he means. [Laughter] Incidentally, I think I found out. When I didn't see him here in the audience, I asked our efficient Secretary if he would make a check to find out where he was and I won't tell you where he found him because I will leave that for him to disclose if he so wishes. But I can assure you that for a few moments I thought he was real mean and that he wasn't going to show up at all.

I am not going to suggest any sub-title for his speech. It might be the interpretation of an insurance policy. I have not had the pleasure of meeting or hearing Dean Farley before, but I have received glowing reports about him and it is with real pleasure to present to you a Southern gentleman, Dean Robert J. Farley. [Applause]

Meaning of Not Meaning

DEAN ROBERT J. FARLEY
University, Mississippi

MR. KLUWIN, ladies and gentlemen:

I turned out to be a prima donna. I thought I was on the program for this afternoon and you may learn less about the meaning of not meaning than I had intended because I haven't finished reorganizing my speech.

The farther I go away from home, the longer I talk. I have gone a long ways this time. I don't know, and I am sure you don't either, why I am here. [Laughter] It is one thing I have tried to figure out. While I was president of the Mississippi bar and a friend was president of another bar, he invited me over there. I didn't know whether I was going to be able to or not. I don't know how he stands on the position of nullification. [Laughter]

We are mighty careful now about that sort of thing but I have always been a little mixed up anyhow. I have gotten a little bit of comfort for a time out of stating that I have an inferiority complex, until I read not so long ago about a person who was always upset or was trying to stand on his feet and talk, and he went to see a psychiatrist because he was able to talk, as I am, pretty well sitting down, in fact, was loquacious. The psychiatrist told him that he thought he might have an inferiority complex and gave him various and sundry tests and measurements and asked him a lot of questions and finally began, to the delight of the patient, to beam on him and said, "You don't have an inferiority complex," and they were both bowing to each other. He said, "No; you are inferior." [Laughter]

All of this brings me around, rather circuitously to the meaning of that meaning. Mr. Kluwin mentioned the fact that I was the dean for awhile and, while I was there — they have got books up there and I found one called "The Meaning of Meaning." Some of you may have looked at it. It is by Ogden Richards — a book on semantics. I tried to read that thing and ever since then I decided on the meaning of not meaning. You have got to leave yourselves some sort of getting-out place. [Laughter]

I could say, "Well, that's not what I meant." I may have to use that this morning before I get through.

I have had the pleasure of meeting a number of you before and some of you have heard me talk before, which makes it bad because, if I had had the time, I was going to try to get up a new speech. I would much rather speak to people who haven't heard me before because then I can use one of the old ones. What I have done is put together two old speeches and one partly new one. [Laughter]

I have to ask your permission to give you a few more items out of my past than Mr. Kluwin did. I have always been somewhat mixed up. On this meaning of

meaning I had experiences when I was younger.

When I was about nine years old I had an older sister who was ahead of me in school and ahead of me in every way. She could argue better than I could and she knew more. She could run faster, but I did the best I could. She had been to school one day and was talking about, "It's a long lane that has no turning."

I got to thinking about that, that that is not so. I have always been a little literal, I suppose. Where I was born, it was the short lanes that didn't turn. It was the long lanes that did turn always. And so I called her attention to that by pointing out the lane between Mrs. Banks and Mrs. Smith. She got very much upset over it and I kept on getting worse and worse and finally she said that I was just a fool. I had been sent to school a week before and, as quick as a flash I said, "He that calls his brother a fool is in danger of hellfire." Well, that brought the house down. [Laughter]

She began to cry and my mother came. When I explained it to her I said that the Bible did say "He who calls his brother a fool is in danger of hellfire," but it didn't say "she." [Laughter] And she went on to say that I would probably turn out like our father, be a lawyer, and I always found out that there wouldn't be anything worse than being a lawyer.

That was my first experience in interpretation. The next one was a little later in this period.

I would stop reading. I would say, "What are you going to say?" If you hadn't intended to say anything, something valid — if you just said "hello" it sounded kind of weak. I never had any proper response until one day I was walking down the street with a colored man who worked for us. He was one of these guitar-playing negroes that was always in good humor and had a ready answer for anything. I was walking down the street with him one morning and a friend of his yelled out, "What you say, Jim?" Without a moment's hesitation, he said, "Let the rough side drag." "Well — [Laughter] I never figured out what that means but when you look back for an answer it puts you on the defensive. [Laughter] When I am hard put by someone, I just say, "Let the rough side drag," [Laughter] and you would be surprised how that leaves them with nothing very much more to say. [Laughter]

My next experience in the university, like a good many students, was that I went with a girl. They are nice. [Laughter] She turned out to be a poet. They published a paper called the Mississippian. In those days they published poetry, short stories, and so forth. This girl, lo and behold, published an ode one day, and the first line of it was, "Thou art a great growing pine tree."

A lot of people around there thought she was referring to me but, strangely enough, nobody ever tried to cut me down. [Laughter] That was another matter of interpretation.

What I am trying to bring out is that— I am not quite ready for that yet. [Laughter]

I went to law school. In those days we studied Blackstone and Coke, "Cuke" we always called him. From Blackstone I learned that Law is a profession of human reason, and from Coke, that reason is the life of the law. In other words, I just went all out for reason and logic. I thought I had been doing it before but I learned that I had considerable lacking.

During the depression I was practicing law very unsuccessfully and, having nothing else to do, I got to just reading cases that I didn't have to read and, among others, I read Brandeis' opinion in Liebman versus New State Ice Company, which ends up with this startling sentence: "If we are guided by the light of reason, we must let our minds be bold."

It was like that long lane had no turning. I thought about it and thought about it. That is absolutely wrong. If we are going to be guided by the light of reason —if we are going to let our minds be bold we have got to get away from ordinary reason. You have to get new thoughts.

I wouldn't try to find a new route for India by sailing in the wrong direction because that is simply highly irrational. In other words, the earth was flat; it had four corners. It was absolutely illogical for Columbus to let his mind be bold by sailing in the wrong direction.

Then I got to thinking about the handmaiden of reason and logic, which is classification. You will find in the books that classification has the function of economy of thought. That is the thing we can least afford to economize in. When I got to looking at that I realized of course, as you do, that you cannot think about a horse and a cow and a sheep and a goat all at one time, but if you put them into

livestock you think you can, but you can't really. I found that out not so long ago.

I have a couple of horses and some cows, which are all livestock. But when I go to buy feed I have to separate them again. You can't just say, "Give me so much feed for so much livestock." You have got to get horse feed and cow feed.

It is the same thing in arithmetic. I found out which is the purest form of logic — supposed to be the purest form of reason. Very well, you have to be able to add horses and cows without reducing them except to a figure. Then you have it. But you have to subtract them again, divide them again, whenever you start doing anything with them. We start out with two primary classifications, divide the whole property. We went on from there. It was just as I did in my childhood, first by interpretation, and then by abstration, and finally by metaphor, like the great growing pine tree. We worked those things around into the most amazing facts.

For instance, we worked out first quasi rem and finally we got around to corporeal and incorporeal things. Incorporeal are things that are not things. For example, Judge Ames, I believe his name was, somewhere around 1856, in Rhode Island, decided that you could bring an action in divorce in rem. I guess for a non-resident it was a very helpful development in the law. He was a poet. He made a metaphor. He made the marital status a res and that worked out fine. Of course, it was silly because everybody knew that it wasn't. But everybody played like it was, until it got down to just his wife. He was one of these apparently literal persons and he got hold of that thing and he put part of it in Connecticut and part in New York and made the biggest mess out of it.

North Carolina versus Williams tried to get him out of it but never quite succeeded because he didn't understand that was a metaphor. There are lots of lawyers who don't understand about metaphors.

You take jurisdiction, which of course is one of our holiest words, and look what it amounted to. You had to share it and you either had jurisdiction or you didn't so they didn't talk about it at all. What is the use of talking about it until they said they couldn't find it. Then they thought up something in the way of outlawing it so they could take his property if they couldn't find him.

Look where we are going from there. We have five bases for jurisdiction on some 12 different issues and it is still going on. Something withdrawn, not by legislation but by judicial action — that of course is the way of the common law and most of it, whenever there is something new added, it is irrational. And so law school people write learned articles. The whole thing is if we acted, or if the judges acted, on a priori or certiorari we would still have the same law that we had the year before. I won't labor that any farther. What I tried to learn was that supreme courts — and I am not restricting myself to the Supreme Court of the United States — now are, and always have been, policymakers.

Strangely enough, whether we like it or not, the greatest judicial legislators in later generations become the great judges. Who is the greatest judge of English history? Lord Mansfield. What did he do? Lifted the whole law and put it into a common law without any act of Parliament whatsoever. A great man, we say now, and I doubt if there was anything said about him in his day.

John Marshall, I suppose, is conceded to be the greatest American judge thus far. He is dead of course. But there were times when Thomas Jefferson didn't think so highly of the fine expressions that he wrote into the Constitution without any very logical basis at that time. But there followed many amendments, if you want to call them that, that Judge Marshall wrote into the Constitution. So much for ordinary logic. All men are liars; David was a man; therefore, David was a liar. That is the way it goes.

Another kind of logic that has been used in law is what I call the book-bear logic. Whenever the courts try to pull back with the brakes on they usually use the if—then and the hypothetical; if they do this, then —goodness! If they allow this action—it has been said over and over—then the flood gates of litigation will be open.

The New York Central Railroad versus Rahn is a case, if you recall, where—that is a New York case where every railroad is entitled to one fire—the court said something in there about that. If you did this it would be such that no prudent man could engage in railroads at noontime—I can't remember what he said, but anyway they said that no prudent man could engage in it and no private purse could bear it. Well, was that true? Was that good? I ask you insurance people because

if it had another way than to build a new insurance company over in Hartford, Connecticut, that's all, the railroad would have bought more insurance to insure them against that.

We overlook the development of another economic factor when we attach liability in a new way.

The third type of logic that we find in law most frequently is two-value logic. Originally it was two-value. Two-value logic is the logic of the primitive, of the children. We tend when we are young — and when we are young as a nation—to divide everything into good and bad, or black and white, or friends and enemies, and we get around with such expressions as wanting everybody to stand up and be counted.

Of course, there are a lot of things that are not black or white and there are a great many things that are not wholly bad or wholly good. But on T.V., in the Westerns, which I am fond of, it is easy there to divide the good men and the bad men. Actually though, that Wyatt Earp is said not really to have been so good, and some of the other sheriffs, but, for our purposes, they are, because that makes them outstanding.

In time of war we have to have two-value logic. Those that are not for us must be against us. They are either friends or enemies. Now that we are facing world leadership, we, who for so long have tried to maintain neutrality, find that India and Ireland are terrible. They always go on and make up their minds. They did the same thing that we did a few generations ago. "Go on and go Communist or else get over on our side." We don't appreciate that, talking about maintaining neutrality. We didn't appreciate the Irish doing the same thing.

That is two-value logic, which is the primitive logic and the logic of belligerence. So the law started out and a person could be guilty or not guilty. He was liable or not liable. But look what we have done. We have discovered that there are multi-values and I suspect that — all indications of it are placed as grades of offenses, the grades of punishment for the same offenses. On the civil side we have added equity and, to boot, we have added administrative bodies, parole system in criminal law, and various and sundry other methods that we have in dealing with criminal law now that are not so harsh. We once had it that you either hung him or didn't for all such offenses.

On the civil side the function of common law procedure was singleness of issue. You finally drove each side to a single issue.

A good modern feeling has gone just the other way. It actually is to allow multiple issues, to permit the merit, as we call it, and mitigating circumstances to be brought in. We have gotten a great many things in that respect.

So much depends, in this business of two-value logic, on your perspective. I have a story; I won't try to tell all of it because it is long. This is an anecdote. An anecdote is just like a joke except that it is not supposed to be very funny [laughter] so I warn you that this is not very funny.

Somehow or other this guy had got off on an island and he had been there for two years. There were things to eat and things to drink and he got along except, and it is only a human want, he just wanted to get away from there. He thought about all sorts of things including the Kinsey Report. [Laughter] He was only 30 years old when he got there and he had now gotten to be 32. He did so want to get back to society again and he thought, and thought, and thought about the ladies.

He had built himself a platform up high in a tree and he had a pair of binoculars that he had saved and he also built a great pile of wood, so that, in case he ever discovered anything in sight, he could light it to be sure to attract attention.

One day, after two years, he was up on his platform, had his binoculars, and he saw a boat, a rubber life raft, drifting towards him. It was just drifting but it was coming right towards his island. It got nearer and nearer and, sure enough, there was a luscious blonde sitting in the stern of the boat. It got nearer and, lo and behold, he got to looking more closely at what she was riding in and there was a man in the bow of the boat. That upset him. He just didn't know what to do. He knew that they were going to come. His first idea was that he was going to kill the man and be done with it. Then he thought, no, that he hadn't come to that yet, that he was going to be civilized about it. But he gave his mind to it and thought about what he was going to do.

They finally got there. He greeted them so very warmly. They turned out to be hus-

band and wife. They were so glad to get to land. He told them now that if all of them wanted to be rescued as soon as possible—he devised a plan of watching. He would take the first watch on the platform, and the man would take the next, and the lady, the third, and that he would go on up now because they didn't want to miss any opportunities. If they liked, they could look around the island.

He climbed back up to his perch again. The man and his wife started walking around the little island. They had hardly gotten started before this voice up above yelled out, "Cut out that carrying on down there!"

They looked at each other. They were just walking along, not even holding hands. The man was upset by it. He said, "That's bad." He said, "This poor fellow has been out here so long that he is having aberrations. Let's not embarrass him by ever mentioning that."

But every minute that guy would yell out, "Cut out that carrying on down there!"

They would look at each other and finally got way apart. They kept on walking and kept on reassuring each other that they wouldn't make any reference to it at all so as not to embarrass himi. They felt sorry for him.

Finally, the man's watch was up and he came down and gave the binoculars to the other man and he got up on the platform. He looked to the north and didn't see any ships. He looked to the east and he didn't see anything. He looked to the west and the south. Then he removed his binoculars and looked down. And do you know what he said? He said, "You know, by God, it does look like they're carrying on down there!" [Laughter]

All of this simply goes to show that a great deal depends on the point of view. [Laughter]

We in Mississippi, for example, have frequently settled the labor troubles of West Virginia. We could send a committee up to West Virginia and straighten them out, and John L. Lewis could have in the past, in just a few minutes. They, on the other hand, I am sure, could do the same thing for us, solve our problems, and have offered to. [Laughter] It is just a matter of perspective.

All of this is working around to two ideas. One of them is that we have had so much so quickly change in technology, society, politics, economy and everything else. We have believed — at least I was led to believe way back yonder when I was in law school — that lawyers primarily — when you talk about the great principle you are talking about abstractions really. You can find a precedent for anything you want to do. That is the reason why supreme courts or appellate courts become policy-making bodies and I think it should be. They usually lag behind the legislative but they are, and always have been, policy-making bodies despite the precedence, because we don't go by goose chases — we have raised them up to livestock, and raised it up a degree to carrier, and with the word "carrier" we can take in planes or we can distinguish between them. We go on and on and on by metaphor and by abstraction, until, by way of abstraction, it can take in anything.

Precedence has ever meant much except as a guide — a good deal of drastic changes as to how we have to raise the abstraction in order to meet modern ideas. I don't mean by that that the courts are not subject to criticism, intellectually. There is nothing else but tears up and tears down, by intellectual criticism, we hope, opinions of the court.

There have been, I think, more just irresponsible abuses of the Supreme Court of the United States and it is getting down to state courts because it eventually happens that you put the judiciary in bad flavor with the public. If you can't restrict it, it is going to spread all the way through. Lawyers who permit themselves to do that are doing a very bad thing, it seems to me. They are those who should be protecting because they are really protecting their own profession.

What I like best is the marine policy, which, I believe has changed very little since its origin, where the insurer is content to bear, and other lovely language, very euphemistic, including piracy. Now, the insurer, in this day and time, is quite content to bear piracy, but it is mighty hard to make him content to bear something else that happens frequently. Piracy doesn't happen in this day and time so often but some of the other things in the marine policies — the insurer gets pretty discontended I have noticed.

That is, again, the interpretation of language as times change. I believe that, which I hope I have already made clear.

I just want to tell one more little story.

Back, before we had T.V., Monday morning was washday. The old lady went down to the stream to do the washing. She boiled the clothes and she was scrubbing them. Bud, her oldest boy, was sitting there on a stump.

As she scrubbed she said to him, "Bud, where's Pa?"

Bud, not in a hurry at all, said, "Oh, Pa is up in the barn."

The old lady scrubbed a little more and she said, "What's he doing up at the barn at this time of day?"

And Bud said, "He hung himself."

"Well," she said, "did you cut him down?"

He said, "No, he ain't d e a d yet." [Laughter]

I personally don't think that the Constitution is going to hell, but we are in a very trying time, because of our development in leadership, internationally, as well as our tremendous internal developments. It is a problem the likes of which no court has ever had before unless it was the one just after the revolution.

I, for one, am not ready to cut them down because I don't think they're dead yet. Thank you. [Applause]

PRESIDENT KLUWIN: Dean Farley, I don't think that any words of mine can better express the appreciation of this audience than has the applause and the continued and undivided rapt attention that you received from them. We are deeply appreciative of the fact that you came all the way from Mississippi, which you have described as a long trip. I don't know what means of conveyance you used, but from the length of your speech and from the distance as you have described it, we only wish you had to come twice so far.

We hope that you and Mrs. Farley will continue to enjoy our hospitality here and that you won't make yourselves as unavailable as you did last night and up until you appeared on this platform this morning.

At this time I would like to present to you the chairman of the Open Forum Committee, Mr. Kraft W. Eidman, who has prepared a wonderful program for you, and who has some announcements to make, Mr. Eidman!

MR. KRAFT W. EIDMAN: Mr. Kluwin, ladies and gentlemen of the convention, and our guests:

The Open Forum Committee has tried to bring to this convention a program which we hope will be interesting and perhaps provocative. There are two sessions, one this afternoon at one forty-five and one tomorrow morning at nine.

We felt that it would be fitting at this time particularly, when we are celebrating the Declaration of Independence of this country, to try to bring to this convention a program which has to do with the relationship between two professions, the medical and the legal, which have helped to make our country great. On the second day, we will have a discussion on one of the issues which is before the legal profession, and therefore, the people of this country. I refer to the question of the abolition of jury trials.

The speakers who will be here are men of vast experience. They have merited recognition in their respective fields. On behalf of the committee, I ask that you do them the courtesy, as well as your officers and yourselves, of trying to be at the meetings promptly. We plan to try to start promptly. I assure you that if you will be there promptly we will give you back some of the time because these programs are planned to run a little less than what the meeting is called for, and you will have plenty of time after the program to carry on your normal afternoon and morning activities. Thanks a lot and we will see you at one forty-five in the Viking Room on the 13th floor. [Applause]

PRESIDENT KLUWIN: Thank you, Kraft.

Kraft has gotten together outstanding national figures and they have come to give their time to us this afternoon and tomorrow and I know that you will do them the courtesy of coming to hear their messages to us.

At this time I would like to present to you another man who has done yeoman service in arranging for this convention and I present to you the general entertainment chairman, Richard W. Galiher. (Mr. Galiher made announcements about the program arranged by his committees.)

PRESIDENT KLUWIN: Thank you, Dick.

I know that, come Saturday, you will all agree that Dick Galiher has done one of the most outstanding jobs in arranging entertainment for you that has ever been done in this Association.

Is Howard Gongwer here? Howard, would you like to come up and make an announcement, please, with respect to the

Men's Bridge and Canasta Committee? (Mr. Gongwer made an announcement about the program arranged by his committee.)

PRESIDENT KLUWIN: Thank you, Howard.

At this time, it is my privilege to present to you the men who have the most arduous and difficult task at these conventions. On behalf of myself I want to express to their wives who may be here my sincere apology because I realize that the wives make the greatest sacrifice when these men accept assignments on this committee. I am now going to name the Nominating Committee. They can serve only as well as you serve them, namely, if you do not come to their meetings and express your views their task is greatly increased. I am sure that you will give them your best cooperation so that, come Saturday, they can present a slate to us which will carry on the fine tradition of this Association.

The custom has been that the second preceding president should act as chairman of the Nominating Committee. I immediately experienced the problem, when that gentleman was unable to attend this meeting, of selecting someone. I have solved it, however, by a fine choice and I have asked Lester Dodd, our immediate past president, to act as chairman of that Nominating Committee. While Lester is coming up, I will name the other gentlemen who will serve with him:

Mr. James—better known as Jim—Allen, of Boston.

Mr. Elmer McCahan, of Baltimore,

Mr. Pat Shannon, of Tampa, Florida, and

Mr. Stanley Long, of Seattle, Washington.

I know that Mr. Dodd has some message for you.

MR. LESTER P. DODD: Mr. President, my good wife thanks you, I know, for the compliment you have paid me.

The committee will be in session this afternoon from two-thirty until four o'clock and from nine to ten this evening. An announcement will be made tomorrow morning regarding further sessions of the committee.

As Mr. Kluwin said, we can do no job in this important function unless you people come in. Give us your suggestions because that is all we have to go by. It is 2:30 to 4:00 this afternoon, 9:00 to 10:00 this evening, the committee will be in session. We hope to see all of you. [Applause]

PRESIDENT KLUWIN: Thank you, Lester.

Unless I hear that there is other business to come before this meeting this morning, the first session of this convention will be in recess until Saturday morning. The schedule is 9:00, but you know, from common experience, after the Humble Humbug party and the entertainment on Friday night, we sometimes get in a little late, so we will try to start promptly at 9:30 Saturday morning. We are adjourned.

GENERAL SESSION

July 6, 1957

THE MEETING reconvened on Saturday morning, July 6, 1957, at 10:00, President Kluwin presiding.

PRESIDENT KLUWIN: Ladies and gentlemen: The second General Session of the Thirtieth Annual Convention of our Association will please come to order.

At this time I would like to request the Reverend Oran Presley, of the Margate Community Church, of Atlantic City, to please open this meeting with the Invocation. The Rev. Presley!

REV. ORAN PRESLEY: Let us stand in reverence and alertness and wait for the Invocation.

Eternal God, we stand in Thy presence for Thou art the Author of our lives, the Judge of our deeds, the Hope of our becoming. Keep our happiness here in Atlantic City from being temporary or shallow but grant to us the deeper joy that comes from lasting followship and real friendship and great tasks and noble goals and the privilege of serving.

We thank Thee for the gifts of life set before us all around us, symbols of Thy

care and concern, but also for those blessings of life that cannot be seen, for honors received and given and brotherhood and courage and kindness and in the days ahead continue to enrich us with these gifts. Guide and strengthen the leaders here that they may take the heritage others have given and exalt it for the good of all and to the credit and glory of our calling.

Into Thy hands, Lord, we place the year that is past and we look to the wonderful mysteries and opportunities of tomorrow. This is our common prayer. Amen.

PRESIDENT KLUWIN: Thank you, Rev. Presley.

(Editor's Note: Here followed the presentation of bridge, canasta and golf prizes.)

PRESIDENT KLUWIN: Dick Galiher and his Committee were outstanding. Our heartfelt thanks to you, Dick, for a fine job well done.

At this time I turn the meeting over to the Chairman of our Memorial Committee, who will perform a sad, very thoughtful task. I present to you our past president, F. B. Baylor. Bill, will you come forward please?

Report of The Memorial Committee—1957

F. B. Baylor, *Chairman*
Lincoln, Nebraska

WE ARE assembled within the sight and sound of the mighty waterway, the courageous passage of which gave character and tradition to the nation founded on its shores. Only two days ago we thankfully and proudly celebrated the birth of that nation and with humility paid honor to those who brought it into being. Today we assert our high regard for members of this association who have devoted their lives, now ended, to the welfare of their homeland whose existence they jealously have protected and whose future they fervently have promoted. The words of Susan Coolidge gave expression to our own thoughts as to the paths they followed and the parts they played.

"He serves his country best
Who lives pure life and doeth righteous deed,
And walks straight paths however others stray,
And leaves his sons, as uttermost bequest,
A stainless record which all men may read;
This is the better way.

"No drop but serves the slowly lifting tide;
No dew but has an errand to some flower;
No smallest star but sheds some helpful ray,
And man by man, each helping all the rest,
Make the firm bulwark of the country's power;
There is no better way."

On still another page of the Memorial Roll the following names of members have been inscribed since last we met:

Harry W. Adams, Beloit, Wisconsin
Robert M. Barton, St. Petersburg, Florida
Wilton A. Block, Rochester, New York
Stephen W. Brethorst, Seattle, Washington
Robert G. Butcher, Richmond, Virginia
Eaton J. Dudley, Terre Haute, Indiana
William D. Gallup, Bradford, Pennsylvania
C. Hundley Gover, Charlotte, North Carolina
J. L. Kearney, Los Angeles, California
John L. Lancaster, Jr., Dallas, Texas
Edgar McComb, Denver, Colorado
Arthur Y. Milam, Jacksonville, Florida
Joseph B. Murphy, Syracuse, New York
Harry T. Poore, Knoxville, Tennessee
Fred O. Reed, Los Angeles, California
Ernest C. Reif, Pittsburgh, Pennsylvania

Their families, the bench, the bar, the communities, cities and states in which they lived and we deplore the loss of their sage and prudent counsel, their skilled and judicious advice and their ever willing and guiding hands.

By virtue of the commission duly granted, hereby is submitted a resolution during the presentation of which let us stand:

BE IT RESOLVED: That, humbly

and sorrowfully accepting the Final Judgment, we approve and accept the words uttered and the sentiments expressed at this service and by Richard Gilder when he said:

"He fails not, he who stakes his all
Upon the right, and dares to fall;
What though the living bless or blame,
For him the long success of fame."

Mr. President, in solemn convocation we have offered tribute to those who have given us a heritage for which we acknowlege and affirm our unrequited indebtedness.

The Memorial Committee respectfully submits its report.

F. B. Baylor, *Chairman;* Oscar J. Brown, *Vice-Chairman;* Pat H. Eager, Jr., Gerald P. Hayes, L. Duncan Lloyd, Joseph A. Spray, George W. Yancey, Lester P. Dodd, *Ex-Officio.*

PRESIDENT KLUWIN: Mr. Baylor, on behalf of the Association, the report of your committee is accepted and filed and we are deeply grateful to you, and I wish you to know that by action of the Executive Committee, a copy of your report will be sent to the immediate family of each member who has passed away during this last year.

We have a distinguished speaker with us this morning and I have asked one of our members to introduce him. Will Mr. Whitehead and Mr. Wilson please come to the rostrum?

Ladies and gentlemen, it is my privilege to introduce to you a comparatively new member in this organization, but one who has contributed a great deal to the success of this Association in the short time that he has been a member. He has been the chairman of the Aviation Committee. He is director of the Central Claims Office of the United States Aviation Underwriters, and I thought it only fitting and proper that a man of his background should introduce our principal speaker today. It is with pleasure that I present to you at this time George R. Whitehead, Jr., who will introduce our principal speaker. Mr. Whitehead! [Applause]

GEORGE R. WHITEHEAD, JR.: Thank you, Mr. President. Ladies and gentlemen: Not so very many years ago a lawyer having an aviation case for attention would be hard pressed to find much airplane case law to help him in his preparation. Today there are services that are devoted entirely to recording airplane decisions and related matter.

In recent years those volumes have become thicker because the work of lawyers seems to keep pace inevitably with an expanding industry. In his annual report as president of the National Association of State Aviation Officials, your speaker today said that the development of aviation will dominate the world history for the next half century. That statement was made in 1938. Certainly the years immediately following 1938 dramatically illustrated the dominant role of air power as a weapon in war.

Those intervening years, too, have seen exciting growth in aviation, business and utility uses as well as the cargo and passenger operations of the scheduled airlines.

In 1956 the scheduled airlines of America flew their 300 millionth passenger. The interesting thing in that statistic is that it took 24 years to fly the first 100 million and a little over two years to reach the 300-million mark. Aviation is certainly big business today. Safety statistics are meaningful to some people and have different meanings to others. For example, in 1956, the overseas enjoyed a fatality-free year, but you couldn't impress with safety statistics, for illustration, the lady passenger who was visibly frightened and audibly praying for a safe return to the ground. "Why don't you pray?" she said to the man in the seat beside her. "It's going to take divine guidance to get us down safely."

He wasn't very sympathetic and so she reproached him, "Can't you see how nervous I am? If you won't pray, why at least do something religious." So he did. He took up a collection. [Laughter]

The insurance industry, of course, has played its own role in the development of aviation and your Aviation Insurance Law Committee is very pleased that you have selected for your speaker today a man who has had a lifetime of experience in aviation.

He flew for the French in World War I before the United States' entry into that war and, thereafter, flew as a pilot for the United States forces in France. His energies have carried him into almost every phase of aviation and, to name just a few, for 15 years he was the director of the Department of Aviation of the State of New Jersey. He is a past president of the Air

Force Association and presently the chairman of its board.

He founded the A.O.P.A., that's the Aircraft Owners and Pilots Association. He has been a consultant to Congressional committees on aviation. He was a war correspondent and an aviation columnist for the New York Herald Tribune. It is my good fortune and a very real pleasure to introduce to you Gill Robb Wilson, the editor and publisher of Flying Magazine. and an outstanding leader in the field of aviation. Mr. Wilson! [Applause]

AIRCONCEPT

GILL ROBB WILSON
New York, New York

Mr. Chairman, ladies and gentlemen: It is nice to be with you. I left Huntington about 4:40 this morning to get here, so you know that I feel that it is profitable that I might spend a weekend, or part of it, with a group that I feel has a very decided mission in that field in which I have spent now some 41 or 42 years.

I don't want to talk to you but I want to talk with you, not about your business or about mine. I publish a magazine which sells about 300,000 copies a month. It is getting up into the realm of public information and I am a director of a life insurance company, Bankers National Life of New Jersey, and have a great many of those cross-current interests which deal with the law, and various aspects of air transportation, but I don't even want to talk with you about those things. I would like to go a little deeper than that because it is my belief that, as the concept is grasped, men will then see that the limitations are a great deal less than they think when they talk about the specializations that gather around aviation, whether they be legal, or insurance, or scientific. I believe that, if you understand what we have been driving at, this little number of us who have spent more than four decades now in this, that it will open up some doors and that you may see that this is not a specialization but it is a way of life and it has the future in its grasp.

As I stand now, matured, the history of the past half century is, for me, a conglomeration of missed opportunties. As I look out on the play of international affairs, as I pay my taxes, as I think of the commitments my children have to the future, I become eager that this thing I am going to talk about be understood because I don't believe that in an era when the tempo has so vastly changed, when the vulnerability of society is as acute as it is, that this nation or civilization itself can proceed to its well being without understanding of what is involved.

When I was a youngster following the first World War, I went down to Versailles to serve as a courier flying dispatches up through the bridgeheads, up to London, down to Rome, various places. In Versailles at the time were gathered the savants, I suspect, of such civilization. There was Woodrow Wilson, our own president, Colonel House, Ambassador Page, Jim Kearney, up here from Trenton, who published the Trenton Times at that time, and who was Wilson's political advisor, Orlando, from Italy, Lloyd George, from Great Britain, all the entourages of those men, historians, philosophers, lawyers, and they were gathered together, as they announced, to make the world safe for democracy. The war to end wars they used to tell us out in the squadrons at the front. So a young fellow was very deeply interested in what these men were going to produce.

In the course of their deliberations they finally called us in and they said, "Young gentlemen, we want to set up a pattern of history, political format, geography, perhaps unique, because we judge that this revolution that has taken place is not in the same perspective as revolutions of the past. We would like to establish a strong, industrial Germany to act as a buffer between Eastern Europe and Asia, and western civilization. One of the requirements that the strong, industrial Germany is to have according to their judgment – we think they overemphasize it but they want it—is the privilege of continuing with and reconstituting their aeronautic industry,

their aviation. What have you boys to say?"

We said, "Don't do that. Gentlemen, you are not dealing with a handful of airplanes. You are dealing with the air ocean. The tools that we have had to work with out here on the front are the crude beginnings and have no significance whatsoever, but the fact that the air ocean has been opened up, it is something at the doorstep of every human being on the face of this earth, and Magellan and Henry Hudson and Marco Polo and all the rest of them put together had no future in comparison to what will be developed in the concept of the air ocean when global-wise we telescope distance and compact time.

This will bring a vulnerability to society. This will bring opportunity to society that will have political, social, economic, geographic impact as nothing has had since the time of Christ."

We were unable to carry our point. The Treaty of Versailles, probably the most profoundly conceived expression of good will, global-wise, that humanity had ever made—the day it was signed was so technologically obsolete as to be misguiding to civilization, and it led them down paths of disarmament. I sat at Geneva afterwards and watched them talk about limiting armament, scrapping battleships, cutting down men with rifles in their hands, the best intentions in the world gone awry, having no meaning for the future of civilization because an instrument of great good will was technically obsolete.

I had a great affection for France. My brother had been killed in the Lafayette Escadrille of France. My father had been a student of cathedral achitecture. He spent much time climbing the roofs on the cathedrals of France. I had a deep affection for it.

The French said, "We will take these airplanes from the Germans and we will add them to our own, and for 20 years France won't have to spend a dollar on aviation."

Four youngsters pleaded with them not to do that telling them they were only hugging an obsolescence to their breasts, they were living with a rattlesnake because it would destroy their intellectual concept. And in ten years it had destroyed it. They poured their national wealth into the Maginot Line and I crossed the Maginot on missions a hundred times and didn't even notice that silly ditch dug down there along their border.

Ten years after France reconstituted her might she was so technologically obolete that he could have been clipped with a bunch of cap pistols. Then up through the years we struggled to tell the world what technologically it could do to keep its thinking straight but without avail.

For 20 years between the wars we wore the label "aviation enthusiasts" until it came almost to be the worst epithet that we could be called because, ladies and gentlemen, this is not a question of aviation. I don't even remember my solo flight. You can talk to any airman in America and he won't tell you of adventure. How many silly books about aviation adventure can you find in comparison to those written about cowboys and murder mysteries and all that. That is not the thing that has been on our minds. It isn't the airplane; it's the country. It's not the geography; it's the peace of the world. It is the equation between intelligently living in your time and clinging to an obsolescence that is always the essence of the destruction of empires regardless of where you find them.

I used to fly over them, Carthage, Babylon, Nineveh, Tyre, Sidon, and the trails of Tamerlane and Alexander, and looked down at these covered villages and land and wondered what is it, what is it that makes nothing survive? Why do they all pass? You and I have lived to see the passing of some of the greatest.

I finally realized that it wasn't foreign conquests that did it. That was only incidental. That was only the modus operandi of the disappearance. What did it? Was it the intellectual failure with the enemy to grasp the doors that were opening out there to tomorrow? Was it the guy that was suspended on the phalanx or the horse and chariot or something else and clung to it past its usefulness? He wrote the epitaph of his country and his sons and his daughters.

We have today a situation in the world with which you are all familiar. Molotov and several others are apparently under house arrest 40 years too late, but that's the situation.

When I came back after the war and told the managing editor of the New York Herald Tribune that there never would be a treaty signed to end World War II and that the collapse of the Axis was only the introductory chapter to 100 years of war

until we wakened up to the kind of world we lived in he got red in the face.

"You mean to tell me that Russia, after all we have done for her . . ." ad infinitum. He should have been sitting at the Treaty of Versailles. That was the same kind of thinking we had back there. But all of this was known. I remember when Jack Curry, a major general of the United States Army came back and told Mr. Roosevelt that he didn't know whether the agreement between the United States, Britain and Russia to stay out of the Balkans and accept no Balkan surrender until Stalin was ready to take advantage or not, was doing anything to end World War II. But he could assure us that it was going inevitably to write the opening chapter of World War III.

Ladies and gentlemen, none of these things has been hidden under a bushel and it's about time to do some straight talking and straight thinking in the United States. With the globe shrunk to the dimensions which a naval or Army aircraft could circumvent in a day, the thinkers of the world, so-called, divide Berlin into four parts, Korea into two, Germany into two, and the brush wars and the inconceivable tragedies that have flowed out of that kind of thinking you and I have paid out in dollars and in heartache and in frustration ever since.

I used to say to myself, I remember back in 1926 — Percy MacDonald here will remember — when we got this business of the air a little formalized, we set up a Department of Commerce. We recognized its potential in transportation. It took us that long. It took us that long to get representation in the Army, in the Navy. We got assistant secretaries for Air, Army and Navy, at that time. We couldn't even approach an independent voice and thought we were the eyes of the fleet, the eyes of the Army. We were something that displaced cavalry and I sat in the halls of Congress and talked about the interlocking of world capitals, about 500-miles-an-hour speed, about the inevitability of the economics of the skyways that would utimately displace everything that had any real economic value in the merchandise field of the world, and I might as well have been talking to the seashore, not that we haven't had a great outpouring of patriotism, but just no concept of what this thing is.

I can remember when Mr. Hopkins was president of the Actuarial Society of America, going to him and saying, "Will you not in the insurance business start to develop actuarial statistics as to what we should be charging for insurance rates in air transportation, because, Mr. Hopkins, before the breath has gone from your and my bodies, you will have to be a rich man to travel any other way than by air." Materials that today seem inconceivable to the American industrialist as rolling in any other way but on the rails and highways, on the bottoms of the ships, and aircraft that are, even today going through their service tests and others on the drawing board will be transporting all these automobiles that you see riding on their trailers from Detroit out through the world. National Cash Register, I.B.M. DuPont— I can think of a thousand of them — we psychologically are going to live in a world where they move at 1000 miles an hour and that is not very far away. You are going to do it and so am I, and continue to have the things into which they put their heart's blood continue to roll at 46 miles an hour.

This thing isn't another form of transportation. This thing isn't another weapon. This thing is a new concept of time, distance and world. Someone was always coming around and saying, "Oh, those cursed airplanes. I wish they'd never have been invented. They do this; they do that.

"Look what has followed in their train, electronics, the atom bomb. They have opened up so many fields of science and such ranges of political thinking that I am all confused. I wish I lived back yonder."

I don't blame them for that because this is a very challenging world but when we put our minds to it, you see, things become so clear. Billy Mitchell was my great pal. When Bill died I wrote an epitaph. I wrote it about Russia. That was 1936, and I said in the epitaph to Mitchell,

"Beware of the bear that walks like a man, the constellation in red from the North. There is the crucial part of America's history to be passed over."

It is no hindsight at all, down in black and white; anybody can read it. It's very simple. Russia had some of the same geographic possibilities that we had. It is 6000 miles from Eastern Europe to Vladivostok and that belt is 800 miles deep. She had no roads. Her rivers run down to the Arctic and don't serve her well. Russia had to take to aviation and any airman of the day knew it.

Therefore, this American-Russian rivalry was a natural culmination of whatever

happened on the battlefield, or on the treaty tables of the whole world, and that is the way it is.

You gentlemen are in the legal profession, in the insurance business, and you deal continuously with concepts, not the letter of the law, because that could always be changed, but the intent, the purpose, the range, the civilizing force of the law, the humanizing capabilities of insurance. You are people who think in concept.

Take that same power of perspective and apply it to this thing but don't think of it as pushing airplanes around. Recognize that what has happened in this world is that all its remoteness has been vivisected. If there seems to be trouble and pain and sorrow in the world it is because all has been laid bare and diagnosed, so that the cure is possible.

I am, I suppose, as an experienced airman, one of the most optimistic minds in the world today because, as I look out, not at my capacity to get at the throat of a fellow man, which I know is only a temporary thing, because man is not made to be a murderer or he never would have dreamed up the glorious, spiritual dreams that are his. He is made to be a friend in the image of something that is higher than himself. I know that that will prevail, and when the temporary situation that are clashes of prejudice and greed passes over then, for the first time, man has the tools to bring about that golden age that Pericles dreamed of, and the prophets have written of, and that you and I would hope for our children and our children's children.

You can't be an airman and really understand the forces that are moving your world today, without having a song in your heart and a tremendous enthusiasm in your mind. This works out lots of dollars, lots of comforts, lots of peace, plenty of advantages which we never had before, because while we are turned to time as a weapon, that same capability turned the other way has such a wedging into humanity as to be inconceivable.

I should judge that the next century will see more outpouring of human kindness represented by such official actions as the Marshall Plan, the various aids with which we work and rush to disaster or helplessness anywhere in the world, more religion, more real glory than in all the 2000 years that have gone by since a man first stepped out and dared be himself in the face of the obsolescent autocracy that controlled his world.

I plead the concept of this because if the concept is large enough, all the rest falls into place and when that happens we have really reached the purpose for which we claim human dignity and human privilege.

Give us now and then your minds, not in the statistics of airline transportation nor in the estimation of our industrial proportion in the country nor in the actual air figures, but give us your minds because we are trying, for the first time in the long run of the ages, to prevent a nation and a world from falling apart back into the hands of yesterday where the Dark Ages have their way with it by keeping technologically and ideologically abreast of our times. If we can do that, we will write no more treaties of good will with ink that disappears as soon as the sun of reality hits it. We will make no more picayunish decisions about principles; we will have no more indecision about how to deal with the disciplines and the routines. Eventually, God willing, we will reach a place where we have peace or prosperity and we will recognize that compromise, and the devil and the forces of evil that have been man's historical definition of international patience has reached its end, and has disappeared as an acceptable method for the peace of the world and the dignity of the human heart. [Applause]

PRESIDENT KLUWIN: Mr. Wilson, in behalf of this Association, I want to thank you from the bottom of my heart for coming here today and giving us this thought-provoking message.

I don't pretend, either, to be a prophet, but I can say as I stand here, as I recall, that at the very same podium in a different city, in 1940, my partner stood here and made the same remarks to a Senator, popularly known as "Curly" Brooks, and who predicted in the matter of increased taxes and increased deficits that several things would occur. I predict for you that your statements today will be prophetic and they will be emblazoned on the record of this Association and appear in our Journal to go to all of our members. Thank you again for coming.

You know, I have heard some remarks that things have been r u n n i n g very smoothly here. Well, behind every movement there is a reason. This has been going on for some time and I think it only

fitting and proper that we make some official recognition here of some of those who have contributed so generously of their time and talents to me through the seven or eight, and almost nine years, that it has been my privilege to serve you, and as one of my last pleasant tasks or privileges, I would like to present to you four lovely ladies who have worked so hard with me. I want to introduce Miss Madeline Osman. Madeline, will you stand please? [Applause] Miss Osman is Ernest Fields' secretary. She came to the first convention when I was secretary back in 1949 and without her able help and assistance, I can assure you that I would have been a flop from the start. Not only has she helped us at these various conventions. At every midwinter meeting in New York, when they have the New York meeting, she has again given unstintingly of her time and talents and I thank you.

Another young lady that I would like to present who has been here at every meeting for the past nine years, and that is my efficient secretary, Miss Scholtka. Will you please stand? [Applause]

We have a new young lady here this year who has been most helpful. She is the secretary of our efficient secretary, Mr. O'Kelley, and I hope she will be with us again, Miss Ellen Lyon. Will you please stand? [Applause]

And another young lady whom you have met, but I want to present her again and thank her again and again for all she has done for me, our efficient Executive Secretary, Blanche Dahinden. [Applause]

At this time I would also like to ask that the following rise as I present them, just take a bow, because without them we wouldn't have had this wonderful convention here. I present to you our Convention Site Chairman, Arthur Blanchet. [Applause] Our fine Program Chairman, Ernest Fields. [Applause] Our Open Forum Chairman, Kraft Eidman. [Applause] Our General Entertainment Chairman, Dick Galiher. [Applause] Our Ladies' Reception Chairman, Mrs. Muse. [Applause] Our Bridge Chairman, Howard Gongwer. [Applause] Our Junior Entertainment Chairman, Mrs. Fredericks. [Applause]

The next order of business is to call upon the chairman of the Nominating Committee. You know, I have enjoyed my work so much for the last year that I seriously considered at about two o'clock this morning dispensing with that order of business because the by-laws provide that I continue in office until my successor is duly inducted so that, if I would dispense with the next order of business I might be able to stay on for another year, and I would love to do that. But I don't want to do violence to our Constitution as has been done by some of the officials in this country in the past few years and so I will call on our good Nominating Chairman, Lester Dodd. Lester, will you come forward? [Applause]

Report Of The Nominating Committee

LESTER P. DODD, *Chairman*
Detroit, Michigan

Ladies and gentlemen: Of course, I must say at the beginning what every nominating committee chairman has said for many years. It is the toughest job in this organization. It is a tough job not because we have difficulty in finding men, but because of the necessity of passing over good men because there simply aren't enough offices to accommodate them all.

The committee consisted of James P. Allen, of Boston, Massachusetts, Pat Shannon, of Tampa, Florida, Elmer B. McCahan, of Baltimore, Maryland, Stanley B. Long, of Seattle, Washington.

I would like to report, Mr. President, that all nominations submitted here were unanimous. They are the unanimous choice of the members of that committee.

We nominate for secretary, A. Frank O'Kelley, of Tallahassee, Florida.

For the office of treasurer—I want to preface it by a comment, Mr. President. It has been a tradition, unofficial, that the treasurer of this organization is permitted to serve five one-year terms following which he is usually replaced. In this particular

year, due to the transition of many of the duties of the treasurer's office to that of the Executive Secretary, in order to be sure that that works smoothly and without interruption, the members of the committee have thought, and consequently submit, nomination for an additional one-year term for Charles E. Pledger, of Washington.

For the office of vice president, John W. Joanis, of Stevens Point, Wisconsin.

For the office of vice president, James A. Dixon, of Miami, Florida.

There are four places to be filled on the Executive Committee. Three, in the usual course of events, and one by reason of the greatly regretted resignation of Warren Reed from that office.

On the Executive Committee, for a term of one year to fill that vacancy, Gordon H. Snow, of Los Angeles, California.

For a three-year term on the Executive Committee, Kraft W. Eidman, of Houston, Texas.

For a three-year term, John C. Graham, of Hartford, Connecticut.

For a three-year term, Thomas N. Phelan, of Toronto, Ontario, Canada.

For the office of president-elect there were two gentlemen prominently mentioned. So strong was the support given to each of them that, out of necessity, the committee was eventually obliged to recognize the geographical, distributional, and other factors of that kind, and we offer for president-elect, G. Arthur Blanchet, of New York. [Applause]

PRESIDENT KLUWIN: Mr. Dodd, I want to thank you for a difficult job well done. At this time, I will entertain a motion, or any nomination, from the floor for any other candidate.

MR. MILTON A. ALBERT: I move that the nominations be closed.

MR. GALIHER: I second the motion.

PRESIDENT KLUWIN: Mr. Albert moves, and Mr. Galiher seconds, that the nominations be closed. Does that include a motion that the secretary be instructed to cast a unanimous ballot?

MR. ALBERT: I so move.

PRESIDENT KLUWIN: It has been moved and seconded that the nominations be closed and that the secretary be instructed to cast a unanimous ballot for the nominees selected by the Nominating Committee. All those in favor indicate by saying "aye;" opposed "no." The "ayes" have it and your new officers are duly elected.

Before presenting them I would like to indulge in just a little thing for myself and that is to present to you the two ladies who have been so responsible for the success of this organization during the past year. I would like to present my wife. [Applause] And I would like to present Mrs. Betts. [Applause]

At this time I would like to ask the newly-elected officers, as I call their names, to come forward and stand up front here so that you will all have an opportunity to see them. The president-elect, Mr. G. Arthur Blanchet. [Applause] The vice presidents, John Joanis and James Dixon. [Applause] From the fact that John Joanis isn't here at this moment you can readily understand the secrecy of our proceedings, because I am sure that if he knew he was going to be a vice president he would surely have been here this morning.

I don't think that the next two gentlemen need any introduction, but I am going to ask them to rise anyway; our efficient secretary, A. Frank O'Kelley, [applause] and our most trustworthy treasurer, Mr. Charles E. Pledger, Jr. [Applause]

For the Executive Committee, for a period of one year to serve the unexpired term, Mr. Gordon Snow. Mr. Snow. [Applause] I can see that Mr. Snow reads the Holy Scripture because he has taken a seat at the back realizing that he would be invited to come forward.

Mr. Kraft Eidman. [Applause] Mr. Thomas Phelan. [Applause] Mr. John Graham, from Hartford, Connecticut. [Applause]

Ladies and gentlemen, take a good look at these gentlemen. They certainly look fine in the morning, don't they? [Laughter] Thank you, gentlemen, and we wish you a lot of success and a lot of happiness in your new offices. [Applause]

At this time, I would like to ask two of our distinguished past presidents, Lester Dodd and Bill Baylor, to escort our new president to the rostrum please. Bill, will you look up and see if you can find Red Betts? [Laughter]

Ladies and gentlemen, as I present to you our new president, Forrest (more popularly and affectionately known to us as Red) Betts, I want to say to you, Red, that, as I hand you this gavel, the token of your authority, I can only say that I leave this office with a deep feeling of

regret because of the fact that I realize that I am getting old, but I also take with me the memory of many, many pleasant hours, and days, and weeks, in this organization, and I know that you will enjoy it just as much as I have, and I pledge to you my support and anything that I can do for you will be done with true love and affection. [Applause]

PRESIDENT FORREST A. BETTS: Thank you, President Kluwin, if I may now address you in that term for the last time. For a minute, I thought perhaps you had decided to forego that portion of this ceremony concerning myself because, up to the present time, I didn't think I had been elected president, but I will assume that my previous election carried on.

I want to reiterate, and I am sure you can stand repetition, my appreciation of having your advice, John, as I go into this office because I know the great value of your experience. I know, as do many of us, the time that you have given to the organization and your intimate knowledge of it, and may I say, and it is not as a swan song to you, that on behalf of the Association, it is fitting that now we could say to you in partial paraphrase of a great statement, well done, good and faithful servant.

If I may digress from there for a minute to add something different—may I say thou hast been a good master over many, many men. Enter now into the kingdom of the past presidents. [Laughter] [Applause]

To Les Dodd's admonition, or maybe it was some other past president, that is made with the understanding that you, of course, must be elected to their sacred body.

I want to express briefly, and before I start this may I say that just before I came up here Dunc Lloyd conveyed to me the suggestion not to speak for two hours. I told him I couldn't wait that long. I want to express to the members of the International Association my deep appreciation of their confidence, my sincere knowledge and appreciation of the obligation and the duties, as well as the privileges which are involved. No man should enter upon any great or important undertaking without first asking the blessing of God.

I shall not borrow the formula of President Eisenhower by giving prayer. Some might think it out of place. But I assure you that I pray not alone to my God, but I pray to you members of the Association, for without your help, indeed, I am nothing. I am of age in this institution. Twenty-one years ago I attended my first convention and there may have been some that thought from past experiences that I might never get to be of age, and I assure you that it is a real pleasure to have come to my 21st birthday and to have accomplished an honor which, frankly, I have treasured in my heart, as a great objective of my career.

Every man must have a goal. May I state mine briefly, and I promise, Dunc, I shall not talk for two hours. I do not know any of the statistics about the jury system. I only try cases in court. I have the feeling that we, as lawyers, particularly when we are in an organization such as this, are inclined to get apathetic as was said, or to not attempt to crash the barrier of indifference, and I think that this poses a great problem for the members of the International Association of Insurance Counsel.

If I say more than would appear to be usual under the circumstances, may I blame that on John. You know, last year he forgot all about me and left me down there and he has been apologizing ever since. That is one of the advantages of it, just like everything else. If somebody doesn't do just exactly right, he spends the rest of the time apologizing to you. If I may say so, I have had a very nice year with John because I've had him over the barrel to start with. [Laughter]

Before we close, I want to call upon a very good friend of mine, a man who has given great service to this organization, and whom we shall all look forward to as the great leader of which his past service has given us proof, for potential Presidency, Art Blanchet. Will you please come forward? [Applause]

MR. G. ARTHUR BLANCHET: Mr. President, members and guests of the Association: At this moment I visualize the role of a president-elect to be this: short on remarks, long on sincerity and gratitude. Looking back over the years, the many happy hours spent with the members of this Association, I can say to each of you with all sincerity and humility, this is my finest hour. Feeling as this, I am sure you will indulge me one more moment if I ask my very dear friend, Ernie Fields, to escort my dear wife, Lucy, to my side so that she may join with me in expressing to each of you our deepest gratitude for

this great honor [Applause]

PRESIDENT BETTS: Thank you, Arthur, very much.

I am sure that the people who are so fortunate as to be here know, as I said before, that your service indicates what may be suspected of you in the future and that, like all of us, you are dependent upon Lucy for that stamina and fortitude to carry you through the vicissitudes of being president-elect and eventually president.

There is one thing that I would like to mention—Jake White called my attention to it last night at the Humbug party—I have noticed an alarming condition developing among the members, and particularly the younger members. I noticed that many of them are beginning to call me Mr. Betts. My name is still Red Betts. Call me that. I don't have the greatest memory for faces but if, after those cards, those identification cards, have been taken from your lapels, I do not know your names, forgive me. I still love you.

I believe that, with the exception of the announcement of the meeting of the Executive Committee, that brings us near a close.

Now, the chair hears from some place a motion to adjourn.

MR. WAYNE STICHTER: May I have the privilege of presenting a very gracious lady at this time?

PRESIDENT BETTS: You may. Oh, my biggest oversight! [Laughter]

[Mrs. Betts was escorted to the rostrum.]

PRESIDENT BETTS: You know, I talked about having John Kluwin over a barrel. [Laughter] It won't be an uncustomary position for Betts, but I would like to say, now that the error has been corrected, certainly there could be no one in this organization that could doubt who is the better half of the Betts family.

Now, unless there be other business which I overlooked, and if there be, speak up, but if there be not, do I hear a motion?

[The motion was made and seconded that the meeting be adjourned.]

PRESIDENT BETTS: The motion is before you, to adjourn sine die. All in favor say "aye." The "ayes" seem to have it, and it is so ordered until next July in Greenbrier.

Can Courts, Juries And Cars Coexist?

JAMES D. GHIARDI*
Milwaukee, Wisconsin

and

STANLEY C. MORRIS**
Charleston, West Virginia

THERE are those who answer this question in the negative. Some say that juries, at least, must go. Others assert that the courts, with or without juries, are unable to cope with the socio-legal problems created by the automobile.[1]

To these writers and speakers the problems chiefly derive from the sheer massiveness of personal injury litigation.[2]

*Associate Professor, Marquette University Law School.

**Of the firm of Steptoe & Johnson; past president, International Association of Insurance Counsel; chairman-elect, Section of Insurance, Compensation and Negligence Law, American Bar Association.

[1]Marx, Compensation for the Automobile's Victims, 42 A.B.A.J. 421 (1956); Graubart, Problems of Automobile Accident Litigation, 42 A.B.A.J. 821 (1956); Hofstadter, Alternative Proposal to the Compensation Plan, (May, 1956) Ins. L. J. 331; Hofstadter, Let's Put Sense in the Accident Laws, Saturday Evening Post, (Oct. 22, 1955).

[2]"It is sometimes suggested that the problem of court congestion can be laid entirely at the door of the automobile. * * * * * * * * * * it is important to point out that (1) the volume is great indeed, but (2) far less than one-half of the seriously delayed cases concerned motor vehicle negligence. Of the 3738 cases on the weekly jury trial list under study, 91.6% were trespass cases. Of the trespass group 78.5%, or about 2635 cases involved motor vehicle negligence. This represents 70.5% of the total volume of cases which reach the trial lists. Note, however, that only 39.4% of the seriously delayed group were of the motor-vehicle-negligence variety. This figure increases as the speed of the group increased, so that in the medium delayed

They have set up a syllogism somewhat as follows:

(a) The courts are unduly congested because of the large number of automobile accident cases being litigated.
(b) Automobile accidents are inevitable, therefore this type of litigation will continue to increase.
(c) The only solution to the problem of congestion is to take automobile cases out of the courts.

There are also writers and speakers, fewer in number, who, on the strength of ideological theses of one kind or another, oppose the American jury system and, indeed, the juristic handling of personal injury cases, whether by juries or courts, in what has been, hitherto, the American way.[3] They too make a major premise of the contention that our courts generally are pathologically congested.

The facts as to court congestion in this country support no such premise. Cars have not defeated and will not defeat the courts.

Where, What, Why Court Congestion?

The most comprehensive and valuable court calendar status studies yet made and published are those of the Institute of Judicial Administration. Since 1952 this non-profit corporation, financed by foundation grant, has been publishing studies on court congestion.[4] These studies have been based on data collected relative to the organization and functioning of our courts. An analysis of the collected statistics indicates the scope and extent of congestion and delay. In the 1953 Calendar Status Study it was stated:

"The nation-wide averages for the 97 courts represented in the study show an average time interval of 11.5 months from 'at issue' to trial of jury cases, and of 5.7 months for non-jury cases. With respect to jury cases, there is a general overall correlation between the size of the population of the county area comprising the court's jurisdiction and the delay in reaching trial, although the range within each major population group is a wide one."[5]

The *1956* report states as follows:

"The nation-wide 1956 average for jury cases is 12.1 months from 'first filing' to trial in the 71 jurisdictions reporting thereon and 10.5 months from 'at issue' to trial in the 88 jurisdictions reporting thereon. The reports for 1955 showed an average of 11.4 months from 'at issue' to trial."[6]

This report goes on to point out that non-jury trials have been reduced to 4.4 months from "at issue" in 1956, whereas in 1953 the average was 5.7 months.

The 1956 report shows that the time lapse from 1955 to 1956 was reduced by nearly one year in jury cases. It contains the following conclusion:

"Once again, eight of the thirteen jurisdictions with the longest delay comprise heavily populated metropolitan areas, with the remaining five in jurisdictions where the total county population is less than 550,000 by the 1950 census. *Other than in these 5 areas, jurisdictions with under 500,000 total county population do not seem to have a serious problem with calendar delays, while those jurisdictions over 500,000, especially those with over 750,000, are, on the whole, faced with a mounting problem of delay.*" p. vi (Emphasis added)

Many of the cases involving automobile accidents arise in the federal district courts, therefore it is necessary to analyze the status of the calendars of these courts. The material is readily available in the Annual Report of the Director of the Administrative Office of the United States Courts.[7] The report reveals the following facts with reference to the civil business of the dis-

[3]Marx, Hofstadter, *supra*, note 1. For an answer to these proposals see: Ryan and Greene, The Strange Philosophy of "Pedestrianism", 42 A.B.A.J. 117 (1956); Snow, Compensation and the Automobile, 23 Ins. Counsel J. 161 (1956); Hart, Shall the Jury System be Sacrificed on the Altar of Economy? 28 N.Y. State Bar Bulletin 146 (1956); Nims, Backlog, Justice Denied, 42 A.B.A.J. 613 (1956).

[4]Institute of Judicial Adm'r., Calendar Status Study, 1953-1954-1955-1956, 40 Washington Square, New York 12, New York.

group, there were 56.25% motor vehicle negligence cases and 74.3% in the medium fast group of this type. No doubt, however, that the volume alone makes motor vehicle negligence a factor to be considered." Tentative Draft, Significant Findings and Recommendations—Philadelphia County, p. C-iv, April 5, 1957, prepared by the Institute of Legal Research, University of Pennsylvania Law School, Judicial Administration Project.

[5]Elliott, Delay and Congestion in State Metropolitan Trial Courts, Institute of Judicial Adm'r., p. 2, (May, 1956).

[6]Calendar Status Study—1956, *supra* note 4, at i.

[7]Annual Report of the Director of the Administrative Office of the United States Courts, 2 (1956).

trict courts.

In 1956, there were 62,394 civil cases filed, an increase of 3,019 over 1955, of which nearly two-thirds were private cases. However, in 1956, for the first time in 13 years, the backlog was reduced from 68,832 to 63,526. The report further points out that the median time for the disposition of normal civil cases has gone up to 15.4 months in 1956. Of these, jury trials have a median of 14 months and non-jury cases 17.2 months. However, the Fifth, Eighth and Tenth Circuits had a median time from filing to disposition of less than one year. The United States District Court for the Southern District of New York, one of the busiest districts, had the following situation:

> "As of June 30, 1956 cases on the jury personal injury day calendar from which cases are taken for trial, were being reached for trial about four months after assignment to it and cases on the other day calendars in an even shorter time. Naturally the time from filing to disposition of civil cases is still much longer, but the disposition of cases that are really ready for trial has been greatly expedited." p. 3

The time lag in this court was reduced by 6.6 months in one year. This same result has been accomplished in other districts and the director indicated that with the continued reduction in the backlog of pending cases the reduction in the time requisite to reach trial should be substantially reduced. During this same period the number of automobile accident cases increased, yet the backlog and time lag were being reduced.

Pathological Court Congestion Is Localized, Not National, In Scope

The studies we have cited are sufficient as to areas covered, as to time included and as to method of compilation to warrant certain conclusions:

(a) In non-metropolitan areas there is, by and large, no court congestion problem.

(b) There are many more courts free of congestion than there are with a congestion problem.

(c) The greater part of the country, area-wise, is served by congestion-free courts.

(d) The most seriously congestion-affected areas are about thirty in number but include large populations.

When one analyzes the statistics, in the 1956 report of the Institute of Judicial Administration, some striking patterns become apparent. It is to be noted that the 97 jurisdictions considered in the foregoing reports involve the major trial courts of general jurisdiction in each of the 48 states, and, in addition, courts of general jurisdiction in all cities of more than 100,000 population and the District of Columbia.

The first striking pattern to be noted, involves the time lag in the courts. Over one-half of these major courts have only a time lag of from 1 to 6 months between "at issue" and trial, which time lag is optimum. A little less than one-fourth take from 6 to 12 months and only a few more than one-fourth take over 12 months. Actually then, serious congestion is encountered in *less than thirty* large metropolitan areas in the United States.

The second striking pattern to be noted, involves the concentration of the congestion. The courts with over 20 months delay in 1956 are located as follows: (a) New York City, *four;* (b) Chicago, *two;* (c) Massachusetts, *three* (Boston, Worcester and Springfield); (d) Connecticut, *three* (Bridgeport, Hartford and New Haven); (e) Manchester, N. H., *one;* (f) Cleveland, Ohio, *one.*

The third significant fact about the statistics we have cited is that they demonstrate that court congestion is not what mathematicians would call a function of population concentration. Nor is it governed by traffic accident incidence alone.

The Milwaukee story is in point. The statistics show that the Milwaukee County Circuit Court had an average time lag in 1953 in jury cases from "at issue" to trial of 30 months. In three years this was cut in half, to 15 months. In 1957, most jury cases can be tried in less than 12 months from "at issue". Automobile accident cases were on the increase during this same period.

Two counties in the New York City area show divergent results. Kings County Supreme Court, New York, with a population of 2,738,175 had a time lag, in jury cases, of 26 months in 1956. This is a reduction from 53 months in 1953. On the other hand, Queens County Supreme Court, New York, with a population of 1,550,849 had

a time lag of 46 months, an increase from 39 months in 1953. This cannot be due to the fact that Queens County, with over 1 million less people than Kings County, has more automobile accident cases. We must look for the answer elsewhere. Kings County is still congested but if this surprising progress continues the congestion will soon be eliminated.

Let us look at Detroit, Michigan, in Wayne County. With a county population of 2,435,235 and a city population of 1,849,568, the statistics show a lag of 9 months between "at issue" to trial in jury cases. On the other hand, Boston, Massachusetts, Suffolk County, with a county population of 896, 615 and a city population of 801,444 (one million less people than Detroit, Michigan) has a time lag of 30 months. Is this because there are less automobile accident cases in Detroit than Boston, or is it due to other factors?

The like question can be asked about the state of Pennsylvania. The court of common pleas in Philadelphia, with a county population of over 2 million, has a time lag of 10.5 months, whereas Alleghany County, (which includes Pittsburgh) has over 500,000 less people but has a time lag of 24 months.

Why Court Congestion?

That such congestion in court calendars as actually exists is solely chargeable to the American automobile has been *assumed* by the writers to whom we have referred but has not been proved. Here the quantitative information afforded by the statistics should be supplemented by a qualitative analysis of the facts.

As a competent practicing lawyer puts it:

> "We can all agree that there is no one method of solving this pressing problem of disposing of litigation, whatever its nature, within a reasonable time . . . . . it's about time we quit overstating and magnifying the scope of the problem."[8]

Mr. Justice W. B. Hart, of the Supreme Court, State of New York, has clearly dispelled the illusion that delay is due solely to the automobile. He states:

> "The history of this State demonstrates the falsity of the contention that calendar congestion in the Supreme Court is due to the advent of the automobile. As far back as 1828 Governor DeWitt Clinton, and in 1834 Governor William L. Marcy, commenting on the judicial system, said it needed to be enlarged 'to meet the demands of accumulated business and to prevent delays which amounted to a denial of justice.' This message was repeated by Governor Marcy in 1835, 1836 and in 1837, at which time he 'recommended an enlargement of the Supreme Court'. The legislature apparently found it inconvenient or impracticable to give the subject the attention it deserved but appointed a commission to investigate the circumstances."[9]

He went on to analyze one of the reasons for delay in New York.

> "It is apparent from the foregoing that congestion has existed in our Supreme Court for upwards of 125 years, due solely to the fact that the Legislature has failed to recognize that with the growth of population, industrial expansion and devices created by inventive genius, additional judicial manpower was not only necessary but, as heretofore pointed out, was recommended by practically every governor since DeWitt Clinton in 1828 and by almost a score of committees and commissions on the judiciary appointed during that period. "In 1894, after the consolidation of the various courts with the Supreme Court, there were 76 Justices of the Supreme Court in this state which then had a population of less than 6 million people (one judge for each 80,000 population). At that time there were no personal injury actions resulting from automobile accidents. In fact, there were no automobiles. In 1956 we have 132 justices in New York State with a population of approximately 17,000,000 or one for each 128,785 population and in the Second Judicial District we have approximately one Justice of the Supreme Court for each 160,000 population."[10]

From the foregoing, one can understand why calendar congestion is prevalent in certain areas of New York. In analyzing the contentions of those who would abolish

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[8]Labrum, Congested Court Calendars, 43 A.B.A.J. 311 (1957).

[9]Hart, *supra* note 3, at 149.

[10]Id. at 150.

jury trials of personal injury cases, we note that they do not advocate an abolition of the presently existing courts. They simply advocate additional manpower in the form of commissions or panels. If this extra manpower is forthcoming in the form of additional judges, in the jurisdictions where congestion and delay is unreasonable, the calendars would be greatly improved without the necessity of substituting experiments for a proven and tried judicial system.

It is a matter of common knowledge that the communities where the courts are crowded are also congested as to streets, schools, recreational facilities and hospitals. Be it said to their credit, however, in those fields they have courageously attacked their problems by providing new streets and throughways, additional schools and more and better hospitals.

The delay in the federal courts is due to a great extent to the lack of judicial manpower. The director's report indicates that the number of civil cases increased 62.2 percent from 1941 to 1956. During that same period of time there was an increase in the number of district judges, in all districts, of only 26.9 percent. The number of private cases terminated by each judge increased by 44.5 percent but this was not sufficient to compensate for the steadily rising number of cases.[11] The courts could do the job if sufficient manpower were available. This position is supported by the deputy attorney general of the United States who said:

> "There is at present not enough Federal judges to provide prompt and effective justice in all cases. It is for this reason that we so strongly endorse the legislation which you have under consideration."[12]

Although the federal courts are disposing of a greater number of cases, lack of manpower prevents the elimination of the large backlog that has accumulated in some of the districts. This must await the provision of more judicial manpower.

Lack of sufficient manpower is not the only cause of delay and congestion in our courts, where it exists. There are at least two other major factors — administrative inefficiency in the courts and the preferences and practices of trial lawyers.

Delay results because of the reluctance of some judges to try personal injury cases. If the average judge spends only a few days each month in trying personal injury cases because he prefers other work, of necessity these cases will cause a large backlog. Another contributing factor is the policy of prolonged judicial vacations. At present most circuits do not hold jury trials during the summer. The judge is either on vacation or working a part time schedule. Judicial vacations are needed, some recess in court proceedings inevitable, but the needs of justice require the gearing of judicial work to the litigation present in the courts and the times we live in.

Inadequate assignment methods in our courts result in the duplication of work and the waste of valuable judicial time on administrative functions. Further, these methods often result in the overloading of one court while other courts remain idle. Judges from circuits or judicial districts with small work loads should be, but too generally are not, utilized in busy circuits to relieve the latter judges. Proper assignment procedures would do much to prevent an uneven distribution of judicial work and its inevitable clogging of court calendars. This can only be done by a proper centralized administration of the court system.

A highly significant survey is nearing completion in Philadelphia and adjoining counties. It goes into the causes as well as the statistics of court calendar congestion to a degree nowhere else pursued.[13] This is truly a qualitative study. It covers with particularity court-room utilization, hours per day and days per year of jury hearings. The report says:

> "Although the responsibility of the judiciary for delays in civil litigation has not been ascertained by the Project in any complete sense since it depends largely on the quality and capacities of individual judges which are not easily susceptible of measurement, the bar approved in a five to one ratio the performance of the bench in the cases interviewed. However, that there is considerable room for improvement has been ascertained. In two two-week periods, one jury and one non-jury, during which actual Common Pleas trials were ob-

[11] Report, *supra* note 7, at 4.

[12] Rogers, Proposed Legislation to Create Additional Federal Judgeships, Dept. of Justice Press Release, 4, Feb. 20, 1957.

[13] Judicial Administration Project, Institute of Legal Research, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia 4, Pennsylvania.

served at City Hall, the median time sat on a jury trial day was slightly less than four hours while the median time sat on a non-jury trial day was less than two and a half hours. These facts and the fact that the four yearly non-jury trial months have no backlogs while the six jury trial months have a nine month backlog show that the courts (at least until most recently) have neither been applying their time to the existing backlog efficiently nor expending very much time when their time is applied to the backlog. Furthermore, long and difficult cases are sometimes postponed for reasons of length and difficulty alone. Of the 109 long cases, six were refused by judges because they would last too long, would require a jury to keep the case over a weekend, or were otherwise unacceptable to the court. Of the remaining 64 cases studied, four were so refused. Delayed decisions by the courts occurred in eight long cases of the 173 jury cases studied."[14]

Trial lawyer practices and preferences are also a factor in the delay of the trial of some cases. It should be remembered that plaintiffs' attorneys are, to a degree, *domini litis.* They properly have much to say as to when their clients' cases shall be tried. There is an *optimum* time for every personal injury case to be tried. In many a case plaintiff and his attorney wish to await the outcome of the injuries before going to trial. In others one or more continuances to procure the attendance of witnesses may be necessary. These are unobjectionable and a not inconsiderable factor in the statistics.

Again, it is to be noted that a large amount of the personal injury work in many jurisdictions is concentrated in a few firms or individual lawyers. Because of the press of other work, conflicting trial schedules and tactical considerations, this overconcentration will result in unnecessary adjournments. Adjournment for good cause, by either party, is essential, but it should never be tolerated when inimical to the parties or to the administration of justice. Another individual cause is the refusal of the courts and attorneys to use time saving tactics, such as pre-trial conferences, stipulation and arbitration. The reluctance to take firm and imaginative steps to require the expeditious trials of cases contributes to congestion. Too many attorneys and judges still regard such procedures as an infringement of the duty and obligation a lawyer owes to his client.

It is, therefore, apparent that the existence in certain metropolitan centers of a large volume of personal injury litigation is by no means the sole cause of the court calendar congestion which exists there.

The causes of delay in trials have been well analyzed by capable writers in the past few years.[15] No member of the legal profession can condone undue delay and congestion, but it must be realized that the causes of delay are numerous and varied. Simply stated they are:

(a) Undermanned courts and circuits.
(b) Lack of centralized court administration.
(c) Inadequate case assignment methods.
(d) Uneven distribution of judicial work.
(e) Failure to use time saving procedures like pre-trial.
(f) Necessary and legitimate continuances.
(g) Dilatory tactics of counsel and their tolerance by the courts.
(h) Complicated court systems.
(i) Short jury trial days.
(j) Short jury terms.
(k) Prolonged vacation periods.
(l) Lack of standardized instructions and proper rules of court. These deficiencies do not exist in every jurisdiction that is evidencing some delay but many are common to all.

The Attack On Congestion

The problem of congestion and delay once existed in many jurisdictions which have now done something about it. The state of New Jersey could well serve as a model or guide for the successful improvement of judicial administration, with its resulting reduction of delay and congestion. For an illuminating and successful program one should read "Clearing Congested Calendars" by the late Arthur T. Vanderbilt.[16] Another interesting result is

[14]Tentative Draft, Significant Findings and Recommendations – Philadelphia County, p. C-iii, April 5, 1957.

[15]Averbach, Tampering with the Jury System, (Feb. 1956) Ins. L. J. 99; Elliott, Judicial Administration—1955, 31 N.Y.U.L. Rev. 162 (1956); Elliott, Judicial Administration—1956, 32 N.Y.U.L. Rev. 116 (1957); Snow, *supra* note 3.

[16]14 N.A.C.C.A. Law J. 326 (1954).

noted in Arizona. A study was made by the Institute of Judicial Administration, under the joint sponsorship of the superior court judges, the Maricopa County Bar Association and the board of supervisors. The director of the Institute had this to say about it:

> "The Institute's report, based on a two-month on-the-spot analysis and survey of the problem was completed in April, 1955. It included eight specific recommendations for changes in internal administration and operation of the Court, and while it recognized that additional judges might ultimately be needed, the report indicated that there was no 'present critical necessity' for adding them.
>
> "Following the publication of the report, most of the Institute's recommendations were adopted and put into effect, with the result that in a twelve month period, the backlog of 1,475 pending civil cases was reduced to 839, with 1,954 cases concluded in the interim. The time lag between trial setting and actual trial was also substantially reduced."[17]

In Milwaukee, delay in the circuit court has been reduced from 30 months in 1953 to less than one year, currently. This was done without any dislocation of traditional and tested judicial methods. The reason for this improvement was stated in a report published by the Public Administration Service.

> "1. The creation of an additional branch in May, 1954.
> 2. The appearance on the bench, through the normal processes of retirement and election of younger more vigorous judges.
> 3. The improved assignment procedures."[18]

A broad scale attack on the problem of court congestion and delay is being made elsewhere. The Attorney General of the United States has called a conference to study and resolve the problem in both the state and federal court systems. A report of the initial meeting of the executive committee of the Attorney General's Conference on Court Congestion was published January 7, 1957 by the Department of Justice.[19] The recommendations proposed by this committee for the solution of the problem are quite forceful and thought provoking. They embody the ideas necessary to solve the problems of congestion and delay as enumerated above, with specific recommendations in certain areas. They recognize no easy solution to increased court loads, the same as there is no easy solution to the problems of taxation, traffic conditions, housing and schools. The committee in paragraph four of its conclusion put the problem and its solution well:

> "4. Because of the widespread attitude of resignation of the law's delay, the solution to the problem will require an extraordinary, nation-wide drive. We are convinced, however, that given adequate judicial manpower and proper judicial administration, this concerted drive can eliminate the existing congestion of cases on the calendars of our courts without subverting fundamental principles of justice. Once this backlog of pending cases is eliminated, and lawyers, judges and litigants are shown that delay is not inevitable in our judicial systems, the business of the courts can then be kept current even though litigation will undoubtedly increase as our economy and population continue to grow."

The goal of this conference is to bring all federal court dockets to a condition where the normal case could be tried within six months of filing. This period of six months between filing and trial is generally regarded as a desirable norm since all cases require a reasonable time for preparation after they are filed.

The American Bar Foundation is taking the lead in the attack on congestion and delay, through its "Project on Congestion in the Courts". This is being done in cooperation with the Attorney General's Conference. In May of 1956, the foundation published a preliminary survey of recent approaches to the problem of congestion and current studies.[20] In analyzing this survey it is interesting to note, how each state has taken steps to improve the administration of justice in the particular localities

[17]Elliott, *supra* note 5, at 5.

[18]The Administration of Court and Legal Services—Milwaukee County, Public Administration Service, 8 (Chicago, Ill. 1955).

[19]Report of the Attorney General's Conference, 43 A.B.A.J. 242, 243 (1957).

[20]Leary, Summary of Recent Approaches to and Current Studies on the Problem of Congestion in the Courts, American Bar Foundation (1956).

that have need for assistance. Of particular interest is the fact that the states (Connecticut, Illinois and New York) that have the greatest need for assistance and improvement appear to be the most active. If responsible elements in these areas work diligently and with good will, the solution is within their grasp.

Conclusion

Although court calendar congestion is present in serious forms in certain populous centers there is no reason for court calendar jitters in this country. The situation calls for medication in the affected areas, not wholesale irresponsible surgery.

Compensation boards, dealing out awards by formula, would compare to the court and jury findings of today as does first aid to full hospitalization.

Again the jury system has an immeasurable value all its own. It keeps the courts close to the people and the people close to the courts.

Our great country is noted for its love of fair play, and abhorrence of injustice. Much of this national character results from our experience with jury trials. The right of being tried by one's fellow citizens, taken indiscriminately from the mass, who feel neither malice nor favor, but simply decide according to what in their conscience they believe to be the truth, gives every man a conviction that he will be dealt with impartially, and inspires him with the wish to mete out to others the same measure of equity that is dealt to himself.[21] We must not suppose that it is trial by jury in criminal cases only that exercises a beneficial influence, or that it can safely stand alone.

"In his able and philosophical work, 'De la Democratie en Amerique', M. de Tocqueville avows his conviction that the jury system, if limited solely to criminal trials, is always in peril . . . He says that in that case the people see it in operation only at intervals, and in particular cases; they are accustomed to dispense with it in the ordinary affairs of life, and look upon it merely as one means, and not the sole means of obtaining justice. But when it embraces civil actions, it is constantly before their eyes, and affects all their interests; it penetrates into the usages of life, and so habituates the minds of men to its forms, that they, so to speak, confound it with the very idea of justice. The jury . . . serves to imbue the minds of the citizens of a country with a part of the qualities and character of a judge; and this is the best mode of preparing them for freedom. It spreads amongst all classes a respect for the decisions of the law; it teaches them the practice of equitable dealing."[22]

Court calendar congestion cannot be saddled on one type of case, on the courts alone, on the bar alone, but is a composite result of many factors. Improvement in our methods of administering justice is needed but it can, and must, be done without sacrificing tested legal principles and procedures. The automobile and its socio-legal problems can be solved and controlled by the cooperative efforts of the bench, the bar and an informed public. The legal profession should be the first to sponsor reform and improvement. It should not allow delay and congestion to take root in any area but it should stand firm for jury trials. Courts, juries and cars can coexist.

[21]Forsyth, Trial by Jury, 354 (1875).

[22]Id. at 354, 355.

Atomic Energy And Financial Protection*

GORDON H. SNOW**
Los Angeles, California

I AM SURE those of you who have elected to dedicate your lives to the handling and administration of claims in its many phases, have many times paused to reflect upon the vast field of knowledge covering many subjects which you have been called upon to at least partially master if you are to do a workmanlike job in this otherwise meticulous but never dull profession.

You will become beset by even greater problems as our social, economic, and tech-

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**Vice President and General Counsel, Pacific Indemnity Company; Chairman, Journal Committee.

nological system continues to demand more and more from people who must of necessity become more specialized, and as a result of these isolated operations will produce strange and fantastic things of which you will know nothing but of which you must ultimately have a working knowledge if you are going to be in a position to cope with the problems and consequences which will flow from these ultramodern innovations.

The present dawn of the Atomic Age promises to present many serious, and in some cases almost insurmoutable problems to the mechanics of our present society, not the least of which will be the impact upon our own profession in being called upon to deal with the consequences which will flow from the attendant hazards to life, limb, and property.

When atomic energy is mentioned, we immediately think in terms of the atomic bomb and the awful devastation visited upon the cities of Hiroshima and Nagasaki by its use in the last war.

In passing on to the problems which have arisen as a result of the discovery of the amazing atom, I hope in a small way to capture your imagination by discussing with you for a few moments the background of the concept of atomic energy. To do this, I must of necessity appear presumptuous, for I am not a scientist and my present use of some of the scientific concepts and terms which I shall attempt to use, I am sure, would cause Albert Einstein, the discoverer of the theory of atomic energy, to turn over in his grave. In fact, if he could today be present in this audience in spirit, he would probably, upon return to his final resting place, become known among his associates in the hereafter as "Whirling Al."

We are about to crash through the sound barrier to the era of the Golden Age, for we now have unlocked from Pandora's Box, to borrow a phrase, that fantastic infinitesimal work horse, the atom. This wonderful, awful, unbelievable source of energy is everywhere about. It possesses Frankenstein propensities, for we have learned to create it but we cannot destroy it. It possesses the most devastating explosive properties on earth, and yet, with its satellite components is the smallest thing known to man. Under control it provides a constant flow of energy which can rather simply be converted to useable power. If uncontrolled or permitted to "run away," its accelerated rate of radiation becomes lethal and deadly to everything in the area, or in the extreme it is accompanied by an atomic explosion of incredible force. It has the shortest and the longest life of any "living" substance known to man, for the radioactivity of the isotope iodine 137 dissipates its radioactivity, or "decays," in but 23 seconds; whereas its close cousin, uranium 238 requires 4,600,000,000 years to arrive at the same result of inactivity or stability.[1]

When I attended the university more years ago than I care to remember, the atomic theory, as I recall, was explained to the class in a matter of one or two lectures. That which stands out most vividly in my memory was the fact that the atom, if we tampered with it, was capable of a chain reaction which could consume the world if triggered off by inquisitive scientists. Further, that the atom was the smallest thing on earth, so small in fact that it could not be seen or measured, and that it was the final unit of matter or substance which was no further divisible, and which was solid, impenetrable, and unchangeable. This concept was based on a chemical approach. We now know that this theory was completely fallacious for, by further scientific retrogression, it is now established that the atom is a hollow sphere; in fact each and every one of them a solar system similar to our own solar system of worlds and planets; and, whereas our system is held together by the forces of gravity, that of the atom is held together by forces similar to electromagnetism.

Present knowledge holds to the theory that this infinitesimal atom which is so small it cannot be seen directly by the most powerful microscope, is in fact composed of a densely-packed internal structure (the nucleus), consisting essentially of protons with neutrons tightly bound together and surrounded by electrons which constantly move around the nucleus in given patterns. The total number of protons and neutrons in the nucleus is the mass number of the element and represents practically the entire mass of the atom. However, the atom diameter is ten thousand times the diameter of the nucleus.[2]

Through a complicated procedure, fission, which is the breaking apart of the atom nucleus, is accomplished by bombard-

[1] "Special Hazard's Bulletin" — Association of Casualty & Surety Companies, No. Z-91, Vol. IX—1956, pp. 1-28.

[2] *Supra*, p. 2.

ment of the nucleus with available neutrons which tend to unite in varying ways and proportions giving rise to the release of neutrons, protons, or both; and in the change of the relationship of the component parts, nuclear energy is derived.

You have heard much reference to these terms and others. You will particularly hear reference to the word "isotope," which is an atom of the same element possessing the same atomic number but a different atomic weight. These isotopes are used extensively in industry and medicine.

Radioactive decay is the process whereby the element or its isotope disintegrates, there being three products of this disintegration; namely, alpha particles, beta particles, and gamma rays, the latter being the most lethal because of its tremendous penetrating qualities. These are the rays with which we will be chiefly concerned in our consideration of these problems, because these are the source of the radiation which must be guarded against in working with atomic energy.

To have any useful purpose, the energy of nuclear fission must be converted to useful heat. This is accomplished by use of the nuclear reactor, which is a large complicated machine. It contains a "core" wherein is located the fissionable material or "fuel." Through use of a moderator to control the rate of neutron bombardment, a slow and orderly chain reaction is set up in the core where tremendous heat is generated, which is transferred out of the reactor in one of various ways, in a manner designed to leave behind all radioactivity. The heat is then utilized in the customary manner to operate boilers, electro-turbines, and the like.

In this process there is ash or waste which is highly radioactive and which must be disposed of in a safe manner, such as blowing it in the stratosphere through tall stacks, as is done at the Brookhaven, L. I., Reactor Plant; or washing it into the ground with water; or submerging it at depths of a mile or more in the ocean in lead lined concrete casks.

So as to give you some idea of the size of these reactors, the world's oldest one, located at the University of Chicago, a uranium-graphite pile chain reactor built in 1942, contains a pile composed of blocks of graphite which in turn contain lumps of uranium in a lattice-like arrangement. The graphite blocks for moderators are 4½ inches square by 16 inches long. Some have holes bored in them into which are inserted the uranium slugs. The pile was built layer by layer (and hence its name), alternating "live" and "dead" blocks. It became radioactive sustaining a chain reaction when the fiftieth layer was put in place. Four more layers of graphite blocks were laid on top as a reflector, and then a cover of six inches of lead and about four feet of wood were in turn placed upon the top of it. The sides are surrounded with a reflector also, and with walls of concrete five feet thick. The pile completed is thirty feet wide, thirty-two feet long, and twenty-one feet high, weighing more than 1400 tons and containing some fifty-two tons of uranium.[3]

USES OF ATOMIC ENERGY

Comparatively rapid development of the use of atomic energy by leading nations of the world has dictated the necessity on the part of the United States of adoption of a program which would keep this nation in a favorable competitive worldwide position. This urgency does not alone spring from military considerations, but perhaps to a greater extent is the result of peace time requirements.

It is estimated that power from reactors in this country will become competitive at from five to seven mills per kilowatt hour, which is presently considerably below reactor power cost.[4] However, in foreign markets where customary fuel is scarce or nonexistent and consequently fuel cost equals or exceeds 20 mills per kilowatt hour, atomic power is presently competitive. The United States has signed 32 bilateral agreements to build research reactors in foreign countries, and seven bilateral agreements to build power reactors.[5]

Radioactive isotopes are largely by-products of the power reactor (but can also be produced in a particle accelerator).[6] These isotopes have widespread use, having increased more than 500% in their useful application in the past five years. By midyear of 1956, 40% of these isotopes were used for industrial purposes, the balance finding their way into medical institutions, universities, foundations, and the medical

[3] *Supra*, p. 14.

[4] "A Grown Survey of the Atomic Industry," Atomic Industrial Forum, Inc. (1955-56) pp. 32-40.

[5] "International Aspects of Nuclear Science and Technology"—Eisenbud (Presented before American Nuclear Society.)

[6] "Nuclear Power and Foreign Policy—35 Foreign Affairs" 1, 2 (1956).

profession.[7] Presently there are planned a number of large power reactor plants in the United States, there being now 87 small reactors in operation or being built.[8]

In 1946, Congress passed the McMahon Act, otherwise known as the Atomic Energy Act of 1946,[9] which confirmed within the government an exclusive monopoly in all atomic matters. However, the government promptly engaged the facilities, functions, and knowhow of private industry to carry out its objectives. This required the issuance of licenses to operators, suppliers, and the like, to aid in the need for quick development of the atomic energy program. The program has now developed to a point where a full recognition of the problems attendant to the program must be acknowledged and steps taken to deal with them.

THE HAZARD

Sources of Radiation:

Now, in all of this profound dissertation, I think the most important phase is that dealing with the hazards of radiation, both presently existent and those anticipated.

All living things are subject to radiation —man and his fellow animals, fish, birds, reptiles, and plants. This exposure develops from many sources. The so-called background source comes from cosmic rays which penetrate the earth's atmosphere from outer space. The standard unit used to measure radiation is called the roentgen, named after the inventor of the X-ray, William Konrad Roentgen, and is said to be a measure of the ability of radiation to knock electrons out of air molecules.[10]

All radiation is destructive. It shortens life, causes cancer, destroys human tissue, and is particularly damaging to the reproductive organs in male and female alike, and will manifest its ultimate degree of harm in our descendants.[11] Minerals in the earth provide the other background source of radiation. Four and three-tenths roentgens has been the total amount of radiation we human beings have received from these sources and from each other up to the age of thirty years. We have now added to this natural source a new source from the use of the X-ray, radium dials on our watches, radioactive fall out from military experimental bomb explosions and even through the use of the cathode ray picture tube in our television sets.

To these sources, we now propose further addition from the operation of cyclotrons, experimental and power reactors, accelerators, use of isotopes in industry and medicine, the general handling of all radioactive substances, and finally in the disposition of radioactive waste.

Radiation is something from which you do not recover. Absorption by the body is cumulative. In short, over your span of years you can absorb but a given amount before damage results. This tolerance varies somewhat with people.

A child's genetic make-up can be affected by the mutations in its parents' genes from the time they are born until the time the child is conceived. For this reason the National Academy study report[12] recommends that as an average for the population as a whole, the amount of radiation to which an individual's reproductive organs are exposed from conception to the age of thirty, be limited to ten roentgen units (the average dental X-ray delivers five roentgens to the patient's jaw but only 5/1000ths of a roentgen strays to such remote parts of the body as the reproductive organs). This is in addition to the 4.3 roentgens accumulated from natural sources. It is further stated that the weekly tolerance of radiation from all sources is 3/10ths of a roentgen.

Up to this point, there has been virtually no addition of radiation to the public by the carrying out of the atomic energy program. However, we are now on the threshold of a potential sizeable exposure, the extent of which will become known only through the passage of time.[13]

THE NEED FOR PUBLIC AND INDUSTRIAL PROTECTION

Financial protection of the public and of industry has been for some time a major problem in carrying out a well-defined peacetime atomic energy program. This problem has received the special attention of the Atomic Industrial Forum since August, 1954. The magnitude of the problem was such that the board of directors of that body on November 4, 1955, after reviewing reports of the sub-committee on

[7] "Major Activities in the Atomic Energy Programs—Jan. to June (1956)" pp. 33-34.

[8] "Atomic Industrial Forum, Inc." (Sept. 1956) pp. 14-15.

[9] 42 U.S.C.A. Sec. 1801.

[10] National Academy Study Report.

[11] PAGEANT Magazine (Nov. 1956), p. 10.

[12] *Supra*, Note 10.

[13] *Supra*, Note 10.

insurance legal problems, concluded that an objective legal study was urgently needed and in consequence thereof recommended that the project be referred to the Legislative Drafting Research Fund of Columbia University.

The project was promptly assigned and received the necessary financial support from the Atomic Industrial Forum, the American Insurance Association, The American Mutual Alliance, the American Factory Mutual Fire Insurance Companies, the National Association of Insurance Brokers, and a number of large industrial concerns having a special interest in atomic energy and the problems relating thereto. A preliminary report of the research fund was submitted in March, 1956, and its final report was made on January 7, 1957.[14]

Time will not permit a review of this excellent work which seems to have touched upon all problems presently anticipated and in each situation has made objective recommendations. I particularly recommend that you read this report which is entitled "A Forum Report—Financial Protection Against Atomic Hazards," which may be obtained by sending $2.00 to the Atomic Industrial Forum, Inc., 3 East 54th Street, New York City.

The development of atomic energy, particularly for power purposes, carries with it the potential for catastrophic loss to operators, suppliers, handlers, etc., because of liability for injury and damage to property of the public, to an extent far beyond that ever known to man in the past. The threat of this huge potential liability is a serious deterrent to the participation of private industry in this program which it is contemplated will be operated under special licenses from the Atomic Energy Commission. So enormous is the undertaking that it is recognized by experts in the field that any program must necessarily have the support and backing of the federal government. The insurance industry, enormous as its resources are, cannot and will not alone risk total depletion of its assets in a program where the degree of exposure is now unknown and rating at best would be guesswork even in the hands of the nation's most experienced underwriters. The public bears the greatest risk of all, and therefore any program ultimately approved must have for its final objective adequate protection of the public, and even then the public will probably be expected to participate to the extent of bearing part of the risk.

The road block to an adequate and successful atomic energy program must also provide the "industry" with protection against devastating losses to its own installations.

RECOMMENDATIONS OF THE ATOMIC INDUSTRIAL FORUM

Time will permit only an overabbreviated resume of the Atomic Industrial Forum recommendations which were made only after a thorough consideration of all problems which appear to exist at this time.

The forum recognizes that any plan finally adopted must be simple, pragmatic, and responsive to changing needs, and that the primary rule of the government should be that of responding only in the event of catastrophe, such as the role customarily played by the excess carrier or reinsuror in normal insurance channels. Private insurers and self-insurers should carry the risk of the average claim.

The forum considered the possibility of imposing a limitation on the liability of the industry above protection available through normal insurance channels similar to the historic shipowner's liability limitation, exclusively under federal jurisdiction; but it rejected this proposal as it would cause too much confusion between state and federal jurisdiction and, finally, would throw too great a potential burden on the public.[15]

Consideration was given to the providing of government insurance to cover the entire project, but this was rejected in principle because the government has usually not provided such a market such as was done under the provisions of the Federal Flood Insurance Act, unless insurance is unavailable on reasonable terms from private sources.[16]

Another approach to the problem was making available voluntary government excess cover or reinsurance to the industry, but the defect in this plan was that whether such excess or reinsurance was carried by the industry was dependent upon the business judgment of the operator, again throwing a potentially disproportionate risk upon the public in the event the operator decided to carry inadequate coverage. Finally, such a plan would throw an unnecessarily elaborate system or structure upon the government, requiring detailed administration.

[14] *Supra*, Note 8, p. 44.

[15] 46 U.S.C.A. 183

[16] Federal Flood Insurance Act of 1956, Sec. 12 (a)

The forum finally gave its approval to the Anderson Bill on this and other points which was reported out but failed to pass by one vote at the last session of the Legislature.[11] Best informed sources believe this bill will pass at the next session. The Anderson Bill, by amending the Atomic Energy Act, would accomplish three objectives:

One: It would require proof of financial responsibility as a condition of licensing certain activities. (This presumably would be provided by private insurance or by a satisfactory showing of financial responsibility. This primary level will probably be settled at $50,000,000.)

Two: Above the level of financial responsibility the government would be called upon to indemnify as a result of the liability created on the part of the licensee and all suppliers, against all direct hazards of radiation (including explosion), to the extent of $500,000,000. This would have the effect of keeping the government out of the insurance business as such. It would require no rating facilities nor other functions necessary to fill its obligations, and would become involved only in the event of a catastrophe.

Three: Finally, it would place a limitation of liability on any claims exceeding the available financial responsibility plus the indemnity. This could conceivably leave some exposure to be absorbed by the public, but this would be very remote as there would be available $550,000,000 for payment of any losses arising from any one nuclear incident. Thus, the Anderson Bill would have the effect of putting the federal government, the insurance industry, the licensed operators, suppliers, handlers, etc., and the public on somewhat of a partnership basis (the government fund would be raised and maintained by a charge of $30.00 per megawatt of thermal energy capacity for commercial licenses under Section 103; less for those licenses under Section 104).

Responsive to the requirements of our national atomic energy program, the insurance industry collaborated and through the efforts of several subcommittees evolved upon a program of marshalling the entire third party liability market to work out a plan to supply the needs of financial responsibility. This required the closest cooperation between the stock and mutual companies, having as their objective the adoption of a standard policy and the developments of uniform standards in the process of rate making, underwriting, engineering, inspection, and claims. As can be imagined, rate making presents almost an impossible problem, for while it is the object to select a rate which is adequate and which still contemplates possible catastrophe, it will probably be—as was developed in hearings on the Anderson Bill—grossly excessive if no catastrophe develops or grossly inadequate if one does.

However, I shall dwell no further on rating problems having made mention of it at this time, because I cannot agree with the Atomic Industrial Forum Report wherein it takes the position that we are here concerned only or virtually only with the potential catastrophe loss. I shall comment further upon this.

On May 9, 1956, the Nuclear Energy Liability Insurance Association (known as NELIA), was formed to be composed by invitation of all stock companies having casualty facilities with a financial rating in Best's, for the purpose of forming a syndicate. The total capacity sought was $50,000,000 (which has not as yet been committed in that sum). On April 6, 1956, the Mutual Atomic Energy Insurance Pool was organized, it being its purpose to subscribe a capacity of $15,000,000 (including reinsurance), from those carriers qualified to enter the pool, to cover bodily injury, property damage, and physical damage. As in the case of the association, the pool has not as yet reached its financial goal.

On November 26, 1956, a joint report was made to the National Association of Insurance Commissioners by the association, the pool, the National Bureau of Casualty Underwriters, and the Mutual Insurance Rating Bureau, announcing its purposes, objectives, and progress.

THE SYNDICATE POLICY

After exhaustive study, an agreement was reached on a liability type of policy which will be written by the syndicate on all nuclear risks, all signatory companies of the association being co-underwriters on each policy, the liability of each company being designated on a several rather than on a joint or joint and several basis. Each subscribing company will have a limitation of the amount originally subscribed, which was the amount agreed upon by each company to provide the capacity of $50,000,000. Rates on a graduated basis and underwriting rules have been agreed upon. I

[11] Anderson Bill (S. 4112; H. R. 12050).

shall make no comment as to the details of underwriting, since this is collateral to our present consideration of this program.

The policy issued in connection with a nuclear facility will insure many interests in addition to the facility operator. This will include owners, designers, constructors, and suppliers of all kinds. It is the objective of the syndicate and its constituent companies to prevent duplication of coverages. Hence there will be one policy issued by only the syndicate, or the pool, to cover the operator and all of its satellite functions. Insurers will adopt a practice of excluding by endorsement all nuclear exposure on all other existing policies which otherwise would pick up a nuclear exposure. Therefore, there should never arise a situation of multiple or duplicate coverage in the event of loss, which could well present a very complex and in fact a hopeless problem of proration. In substance, one policy will insure all risks and will agree to pay on behalf of the insured all sums which the insured shall become legally obligated to pay, as damages for bodily injury and property damage, because of a nuclear incident. The hazard insured against includes the exposure of contamination, radiation, and explosion, as more particularly defined in the policy. The policy contains a number of exclusions, most notable of which is the exclusion of war nuclear exposure.

It is presently not clear exactly how the syndicate and pool will operate insofar as administration is concerned. A certain staff of personnel will of necessity be required to handle such matters as underwriting, statistics, and other details, but it is not contemplated that these organizations will be fully staffed functional insurance operations.

For example, the policy specifically provides under 3(b) of Conditions for payments for expenses incurred in the investigation, negotiation, settlement, and defense of any claim or any suit including but not limited to the cost of such services by salaried employees of the companies, fees and expenses of independent adjusters, attorneys' fees and disbursements, etc. It is yet too early to determine the precise manner in which the syndicate would function in the event of losses, but it is assumed by most people close to the picture that claims probably would be referred substantially to independent adjusters. In the event of catastrophe, the resources of perhaps all of the independent adjusting services in the nation would be marshalled, as well as the facilities of the insurer, to give whatever massive attention to widespread claim and loss would rise from such catastrophe. Would it not, therefore, appear both advisable and essential that those of you who may be so called upon to adjust and determine on such claims to be as fully informed as possible of the problems which will undoubtedly arise?

THE ROLE OF THE ADJUSTER IN THIS PROGRAM

All of this background leads us to the final inquiry as to the activity of the professional adjuster in the administration of this enormous program.

Handling of losses, whether arising from catastrophe or otherwise, is certain to present rather stunning problems. I very much disagree with the conclusions reached by the Atomic Industrial Forum to the effect that this program possesses principally a catastrophe problem To be sure a catastrophe would be a problem, and indeed an enormous one, but the potential for a catastrophe is almost non-existent because the source which would produce such catastrophe in every case will be under the control of highly experienced and skilled scientists. The real problem will arise in the handling and use of radioactive material by many lay persons and the imaginary ills which it will be claimed are attributable to radioactivity as a result of such handling.

The concept of our common law throughout the ages has been to erect certain barriers which would guard against the manifestation of fraud by one upon another through the medium of claiming damages with the ultimate result of unjust enrichment. The law has zealously guarded against this contingency. For example, the court in the English case of *Victorian R. Comrs.* v. *Coultas,*[18] laid down what it regarded as the basic rule concerning recovery for fear, fright, apprehension, etc., without physical injury, wherein it stated: "Damages arising from mere sudden terror unaccompanied by any actual physical injury but occasioning a nervous or mental shock, cannot under such circumstances be considered a consequence which, in the ordinary course of things, would flow from the negligence of the wrongdoer . . . The

[18]LR 13 App. Cas. 222.

difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field open for imaginary claims."

As early as 1905, we find the courts recognizing an extension of the rule in the case of *Huston* v. *Freemanburg*,[19] where the court stated: "In the last half century the ingenuity of counsel (and they were not referring to NACCA), stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance, but it is only in the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration and even of actual fraud in the ordinary action for physical injuries from negligence, and if we open the door to this new invention the result would be great danger, if not disaster to the cause of practical justice."[20]

These words were uttered as a result of great concern more than 57 years ago and at a time when virtually no problem arose in determining or sensing the trauma or source of violance which caused the injury complained of and from which flowed these many subjective things such as apprehension, fear, etc.

Although there has been a gradual deterioration of the basic rule that such illusory things cannot be made the basis of a claim for damages without accompanying physical injury, we are now upon the threshold of a source of trauma and violance which cannot be seen, which cannot be detected by human senses, and in many instances which leaves no sign of trauma at the time of exposure but manifests itself at a later date in a most awful and gruesome manner. Will it not, therefore, become necessary in our methods of dispensing justice to recognize that our old standards can no longer be used, and that we must, therefore, adopt a new basis upon which to determine whether in fact there has been injury and whether as a consequence thereof the elements of emotional fear, apprehension, concern, etc., are real as distinguished from imaginary, and whether or not in fact even the imaginary ills become real because of the existence of this tremendous force about us?

Now let us superimpose this problem upon the problems which already beset us in this business; namely, the individual who would seek to recover damages based entirely upon fiction. People are basically honest and well-meaning, but we cannot ignore the existence of certain individuals who would profit by trick and device.

I am thinking of such situations as occurred to a transit line operating in the city of Boston, where one of their street cars became involved in an accident. Almost immediately the transit line was beset by receipt of 240 lawsuits on the part of passengers claiming they were injured in that particular accident. The capacity of the street car, including standees, was 68. One hundred and seventy-two people were indulging in an act of fraud in attempting to capitalize upon this accident. In Chicago, a transit company received a report of two of its street cars colliding. By noon of the same day thirty-four people appeared at the claims department of the transit company demanding damages for personal injuries. Investigation of the facts indicated that one of the street cars was deadheading back to the barn and was occupied by only the motorman and the conductor. The other street car was a repair car occupied only by a motorman and a conductor.

It is this type of situation which will be substantially aggravated by the existence of this new peril for it opens the door even wider to the professional claimant who by his wits would seek to recover monies to which he is not entitled. To this class of claims will be added many cases presented by people who suddenly become aware of the existence of radioactive materials in their neighborhood, such as the operation of a power reactor or experimental reactor, the handling of radioactive isotopes, etc. Any unexplainable physical condition will become attributable to radioactivity. The leukemia victim, the cancer victim, the women who is unable to conceive an offspring, the child bearing any one of hundreds of abnormalities, the incompetent, the blind, the spastic, the paralytic, and so on, all situations which apparently can arise from radiation or from mutations resulting from radiation in the ancestor.

At this point I would like to answer ques-

[19]212 Pa. 548; 61 Atl. 1022.

[20]Also see American cases of *Spade v. Lynn & Boston R.R. Co.* (1897) 168 Mass. 285, 47 N.E. 88. Also *Mitchell v. Rochester R.R. Co.* (1896) 151 N.Y. 107; 45 N.E. 354.

tions as to how one will go about separating the legitimate from the illegitimate, the proper from the improper, the meritorious from the unmeritorious, but I can only find myself in the position of asking these questions rather than trying to answer them.

I am not here suggesting that there are no defenses to these cases. Radiation does leave telltale marks and is normally a condition which can be diagnosed, for radiation can be measured by delicate instruments. However, radiation comes from many sources and it may not be a simple matter to determine whether the radiation came from the source which you seek to defend or whether it came from any one of many other sources.

As yet, we have no sign posts in our legal machinery to guide us. At the present time I am able to find but one reported case in the United States dealing with the claim of a third party. This claim is for alleged loss of property. This is the case of *Bulloch v. United States,* and was tried in the United States District Court for the District of Utah,[21] and involved a claim on the part of the plaintiff that his sheep, while crossing land approximately fifty miles from the Nevada Proving Grounds, became radiated by radioactive fallout as the result of the discharge of an atomic device. It was contended by plaintiff that the sheep revealed evidence of beta and gamma ray contamination, on which point there was some evidence, and that the government was negligent in failing to warn ranchers of the fact that radioactive material would be discharged into the atmosphere in that area. The case was vigorously tried on both sides but plaintiff was unable to definitely connect the abnormal loss of part of his herd with radiation, it being shown by the government that the severe winter and other factors could reasonably have caused the losses. The case, therefore, stands only for the proposition that the government can be liable for the negligence of its employees in the handling of radioactive substances, a fact already well established.

Authorities appear to agree that we are dealing with such dangerous and lethal substances as to bring the liability of its operators, handlers, suppliers, etc., within the rule of strict liability as announced in the early English case of *Fletcher v. Rylands*[22] which rule is recognized by most states. Thus, a showing of radiation or contamination causing some recognizable injury or damage which can in whole or in part be attributable to a source of radiation, would appear to render that source prima facie liable; and a showing of the highest degree of care would not be a defense if the rule in the *Fletcher* case is to be followed, and it is reasonable to believe that it would be in most jurisdictions.

In its consideration of ways and means of handling financial protection, the Atomic Industrial Forum in its report considered, among other things, a system of compensation to render security to the public sustaining injury as a result of the radioactive hazard. The forum, however, rejected this approach upon the broad principle that, unlike a tort recovery, compensation does not pretend to restore to the claimant wnat he has lost.[23] It was pointed out that because benefits are generally in terms of percentages of loss of earning power plus medical and hospital care, such a plan would be unworkable, and that a plan of compensation could not provide equity to the poor man and rich man alike for their standards are virtually different and their remedies should be corresponding. There were other technical objections, all of which could be overcome by legislative measures.

I do not advocate the adoption of a compensation plan, certainly at this point, but I wonder whether we are confronted with such a tremendous force and with such correspondingly tremendous problems of identifying alleged injury and damage, and difficulty or impossibility of establishing proximate cause, and the tremendous incentive for fraud, that our present system of tort law will be unable to cope with the consequences of this hazard, even though redesigned to accomodate handling of the problems. Will it not then be necessary for us to at least seriously consider the possibility of taking the position that the public must be protected and that, no matter how they become radiated, they will be taken care of through the medium of insurance very much on the basis suggested by the Atomic Industrial Forum, but under

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[21] *Bulloch et al., v. United States,* 9 CCH—Neg. Cases (2d) 705, 145 F. Supp. 824. See: 5 CCH Neg. Cases (2d) 605, 133 F. Supp. 885, court's prior decision on motion to dismiss.

[22] *Fletcher v. Rylands,* 3 H. L. 330 (1868).

[23] 2 Larson, "Workmen's Compensation Law" (1952), Note 137 at p. 10.

the mechanics of a system of compensation rather than the presently suggested plan of liability insurance?

Time and time alone will dictate the proper course to be followed, and no doubt you will play a very important part in shaping the destiny of any program ultimately to be adopted.

Report Of Financial Responsibility Committee—1957

MARCUS ABRAMSON, *Chairman*
New York, New York

ONE OF the interesting legislative developments this year was the final completion of the roster of the states which have adopted the security-type Financial Responsibility Law (except, of course, for Massachusetts with its long-standing compulsory automobile liability insurance law.) This year, the two states (Kansas and South Dakota) which had not previously enacted such a law, finally adopted it. The growth of the security-type law has been gradual.[1] It will be noted that the first law of this kind was enacted in 1937, fully ten years after the Massachusetts Compulsory Automobile Liability Insurance Law went into effect, culminating, as above stated, in the enactment of the last two laws in 1957.

That the Financial Responsibility Laws have done a substantially effective job in protecting the public against the financial consequences of motor vehicle accidents is proved by the record. This shows that no more than 25 to 30% of cars on the road were covered by liability insurance, prior to the enactment of these laws. On the other hand, a recent survey indicates, approximately 85% of all private passenger automobile country-wide carried liability insurance in 1956. Nevertheless, many states have been studying ways and means of closing the small remaining gap to assure full financial protection to the public. The enactment of the compulsory automobile liability insurance law in New York in 1956 accelerated the interest in this problem in many states. Thus, in the 1957 legislative season, with 49 legislatures in regular session,[2] 31 of them considered compulsory automobile liability insurance legislation. Many of the bills introduced in 1957 were patterned after the New York law whereas, in previous years, compulsory legislation mainly followed the pattern of the Massachusetts law.

It is significant that only one state — North Carolina—enacted a compulsory law this year. This new law is similar in many respects to the New York statute. The new North Carolina law which will become effective on June 1, 1958, requires proof of financial responsibility, as provided under the Financial Responsibility Law, upon registration of a motor vehicle, such proof to be maintained throughout the regisration year. Such insurance proof need not be coterminous with the regisration period. Many of the provisions of the pre-existing Financial Responsibility Law, including those relating to proof and assigned risks, are continued in effect. Unlike the New York law which expressly leaves the regulation of rates undisturbed, the North Carolina law directs the insurance commissioner, in the manner provided by the Automobile Liability Rating Law, "to establish rates which adequately and factually distinguish between classes of drivers having safe-driving records and those having a record of accidents, so that those drivers with a record of no accident shall not be subject to unreasonable, unfair and discriminatory rates." A striking feature of the North Carolina law is that it declares it will become "null and void" on May 15, 1961.

Fourteen legislatures approached this problem of "closing the gap" by considering proposals to set up an unsatisfied judg-

[1] Years in Which Security-Type Financial Responsibility Laws Enacted.

Year	1937	1941	1943-4	1945-6	1947
No. of Laws Enacted	1	2	4	6	6
Year	1949	1951-2	1953-4	1955	1957
No. of Laws Enacted	7 (Incl. Hawaii)	14	6 (Incl. D. of C.)	1	2

[2] These included all the states, except Kentucky, Mississippi and Virginia, and Alaska, Hawaii, Puerto Rico and the Congress.

ment fund, mainly along the lines of the New Jersey Unsatisfied Claim and Judgment Fund Law. Again, only one state—Maryland—enacted such a law. The new Maryland law is to become effective April 1, 1958, with respect to the creation of the fund, and will be applicable to accidents occurring on or after June 1, 1959. This new law is based on the New Jersey law with a number of variations.

Under the Maryland law, the initial assessment is to be $8.00 for uninsured motorists, $1.00 for insured motorists and ½ of 1% on insurers. There is to be no subsequent assessment on insured motorists, but insurers will pay 10% of the estimated deficiency in the fund or ½ of 1% of premiums, whichever is less, with the remainder of the deficiency to be assessed against the uninsured motorists. Limits under the law are $10,000/$20,000/$5,000 with a $100 deductible. Persons covered by workmen's compensation are not barred from recovering from the fund. Workmen's compensation benefits are not deductible from recovery from the fund, nor is such recovery deductible from workmen's compensation benefits. Benefits recovered from other sources are likewise not deductible. A motorist carrying insurance with less than the prescribed limits is considered an uninsured motorist, with recovery of the excess over his limits recoverable from the fund up to the $10,000/$20,000/$5,000 limits. Relatives other than the spouse of the judgment debtor, and occupants of the uninsured car other than the owner-driver, are not excluded from recovery from the fund.

It may be noted that in both Maryland and North Carolina the respective legislatures were faced with a choice as between compulsory insurance and unsatisfied judgment fund and after extended and intensive legislative activity decided the issue as above reported.

It may also be noted that in New York, where the compulsory law became effective on February 1, 1957, "supplementary" legislation was given a great deal of attention in the 1957 session. In fact, a bill to set up a supplementary motor vehicle accident indemnification plan passed one house but failed in the other. During the discussion on this legislation in the legislature it was emphasized that the compulsory law had left "gaps" which required additional legislation to remedy.

Special reference should be made to legislation enacted in the state of New Hampshire. This new law (effective September 1, 1957) amends the Financial Responsibility Law to make it mandatory for every policy issued in the state to include the uninsured motorist coverage (Family Protection Coverage) which is now being written voluntarily by the companies in almost every state. The new law also provides that security, when required under the Financial Responsibility Law, shall in no case be less than $500.

Adopted amendments to some of the other Financial Responsibility Laws included increase of the required liability limits in Georgia (5-10 to 10-20), Indiana (5-10-1 to 10-20-5), Iowa (5-10-1 to 10-20-5) and Pennsylvania (5-10-1 to 10-20-5) and the addition of reciprocity provisions to the Financial Responsibility Laws of Nevada and Oklahoma.

The Florida law was amended by modifying the reciprocity provisions so as to conform to the corresponding provisions of the model bills and in Vermont the law was amended to make suspension provisions applicable to a Vermont resident whose license is suspended or revoked in another state because of failure to furnish to such other state proof of future financial responsibility.

Several states have set up special committees to study the automobile insurance problem and related questions and to report back to their next legislative sessions. These states are: California, Maine, Michigan, Tennessee, Texas and Washington.

In the meantime, the companies have been studying ways and means of making the Uninsured Motorists Coverage available to non-car owners. It is expected that this coverage will be so made available in the near future.

Respectfully submitted,

Marcus Abramson, *Chairman;* Harold Scott Baile, *Vice Chairman;* James P. Allen, *Ex-Officio;* W. Neal Baird, Frank Carter, Frank J. Creede, Robert L. Earnest, Edgar Fenton, T. Paine Kelly, Jr., Wiley E. Mayne, Arno J. Miller, Henry S. Moser, W. A. McCullen, William G. Pickrel, Charles S. Ward.

OPEN FORUM

SHOULD JURY TRIALS BE ABANDONED IN NEGLIGENCE CASES

KRAFT W. EIDMAN, *Chairman*
Houston, Texas

JESSIE W. BENTON, JR., *Vice Chairman*
Short Hills, New Jersey

CHAIRMAN EIDMAN: The subject of this second forum is, "Should Jury Trials be Abandoned in Negligence Cases?" As most of you know, this is one of the fields in which there is a great deal of controversy at this time, one in which the American Bar Association has interested itself. I noticed in this morning's paper that the president of the American Bar Association, Mr. Maxwell, made a speech on the subject yesterday at the Diamond Jubilee Meeting of the State Bar of Texas in Fort Worth. He also has written on the subject extensively, the last piece that I have seen being in the June issue of the American Bar Association Journal.

We are fortunate again, we feel, this morning in having speakers who are qualified to speak in this field and on this subject. The first speaker will be introduced to you by Mr. Lew Ryan of Syracuse, one of the members of your Executive Committee. Mr. Ryan! [Applause]

MR. LEWIS C. RYAN: Mr. Chairman, ladies and gentlemen: Kraft asked me if I would introduce our first speaker, who happens to be a New Yorker and a friend of all the lawyers in New York. He is a man who has been a trial lawyer all of his life and not only has great ability but he has great courage.

Recently he engaged in a public debate on this very subject with the presiding justices of two of our important appellate courts in which he frequently appeared and I would say that he let everything go including the kitchen sink and I think everyone in the audience, or practically everyone, agreed with him.

He has a very large law firm up in Niagara Falls. He is a civic leader. He is president of the Community Chest. He is president of the Chamber of Commerce and he has been president of everything else, president of the city bar, and president of the county bar, and, at the present time, he is president of the New York State Bar Association and one of its two delegates to the House of Delegates of the American Bar Association.

About a year ago his alma mater made an award to him in recognition of his outstanding ability and for his distinguished accomplishments in the field of civic affairs. A month ago they had a dinner for him—the lawyers of his county up in Niagara Falls—which I attended and, on that occasion, I saw his picture in the paper with some other distinguished people because the next day he was to receive an L.L.D. from Niagara University.

It is a great pleasure for me to introduce to you one of our top trial lawyers in New York, Mr. Clarence R. (Spike) Runals. Spike! [Applause]

Abolition of Jury Trials

CLARENCE R. RUNALS
Niagara Falls, New York

WHILE the time and the place of our meeting are more conducive to relaxed than serious thoughts, it is appropriate that we consider a current movement to abolish the right to trial by jury in civil actions. We would be ostrich-like if we did not recognize that such movement is gaining momentum.

The fact that previous assaults upon the right to trial by jury have been made

and repulsed is little assurance that the present one will fail.

Necessary limitations of time will not permit discussion of all phases of this important subject. Within the time reasonably allotted therefor, let us consider some of the broader aspects of the basic question whether repeal of such right would be in the public interest.

To the American people the right to trial by jury has been a symbol of democracy — a bulwark against intemperate, arbitrary, capricious action, whether of sovereign state or judge. The reason is not difficult to discern. Every school child knows of the "bloody assizes" presided over by Judge Jeffreys. His name has become a byword of infamy; an attribute of merciless severity, mockery of justice, heinous inequities.

Every school child is taught the guaranties of liberty wrested from King John on the field at Runnymede and the base phrase in Magna Charta that "no freeman shall be deprived of life, liberty and property, but by the judgment of his peers or by the law of the land."

In the Declaration of Independence one of the abuses and usurpations of the King of Great Britain which caused separation of the Colonists from the Mother Country was "for depriving us in many cases of the benefits of trial by jury."

The jury box and the ballot box frequently have been called "the twin pillars of liberty."

But now it is contended by some that the reasons that made the right to trial by jury venerated no longer exist; that there is no foreign monarch against whose despotism rights of citizens need protection by juries; that jury trials are too slow and cumbersome and cause congestion of court calendars so that justice is being denied by being delayed; that jury trials in civil actions belong to the horse and buggy days and not to this automobile, airplane and atomic age.

The principal danger to preservation of the right to trial by jury lies in apathy of the people. The pitifully small percentage of qualified electors who vote upon proposals to amend their state constitutions gives rise to concern of those who believe the right to trial by jury should be preserved. History is replete with instances demonstrating that an active, energetic, persistent minority can w e a k e n and eventually control a large but apathetic majority.

If the right to trial by jury were repealed and determinations affecting the property rights of citizens made by judges alone, public confidence in our judiciary would be impaired. During the past several years repeated assaults upon the integrity, competency and impartiality of judicial officers have been made and given wide publicity. A few illustrations will suffice:

On January 23, 1948, a full-page advertisement entitled "Behind the B l a c k Robes" was published in the New York Times and many other n e w s p a p e r s throughout the country by the Women's Home Companion, a magazine stated to have an average circulation of more than 3,700,000 copies.[1] Sweeping generalizations of unfitness of judicial officers and of partisan selections of unfit persons as judges were made. The purported purpose of the article was to support the so-called Missouri Plan for the selection of judicial candidates. Having assumed the premise that many judicial officers are incompetent, lazy, guilty of undignified conduct and arbitrary, the question was posed, "How do we get such judges? If there are too many rotten apples in the barrel, perhaps our method of picking is at fault." The following is an additional excerpt from the advertisement:

> "Missouri, before 1940, had the customary stench of a State where bosses run the judges. Judges had to give a full year's salary to their political backers to get on the bench—and submit to extortion and pressure to stay there. Lawyers were chosen by clients on the basis of the pull they had, on their ability to 'get to' the judges."

Widespread newspaper publicity was given to statements purportedly made by Governor Dewey at the Governor's Conference at White Sulphur Springs on June 19, 1950, that some New York State judges had "become ill, senile or drunks," leaving to speculation the identity and number of the allegedly incompetent judicial officers. Governor Dewey denied having made the statement attributed to him. Despite such denial, great damage was done.

In March of last year the president of The Association of the Bar of the City of

[1]American Bar Association Journal, March 1948, page 176.

New York released to the press a letter to the chairman of The Temporary Commission on the Courts criticizing the commission for its omission to recommend a change in the present method of selecting judges. The letter received wide publicity. In part it stated:

> "If there is one thing vital to sound government it is an independent judiciary, beholden to no man and administering justice without fear or favor. Surely a system which results in electing men to the bench encumbered with such a plethora of political obligations is destructive of first principles. Is it any wonder that so many clients whose cases are about to come to court believe, whether rightly or wrongly, that they will receive favorable treatment only if they hire a lawyer who happens to stand well politically with the judge or is a member of some political, religious, fraternal or other organization to whom the judge is indebted. The mere fact that *this view is widely held,* however unwarranted, reflects great discredit on our judicial system and shakes the public's confidence in our courts." (Emphasis supplied)

Other illustrations, of which regrettably there are many, will occur to you.

Lawyers know that the standards of judicial fitness, integrity and devotion to public duty maintained by the judiciary of our nation are high. We deplore unjust and unfounded sullies upon the character and fitness of a judiciary of which we are justly proud. However worthy the motives of those who have criticized our judiciary, the effect upon the people is the same. Attacks upon the competency and integrity of judicial officers cannot be made for any purpose, regardless of its merits, without leaving their imprint of impaired confidence in the judiciary upon the citizenry.

In a republic such as ours it is of great importance that defeated litigants have confidence their causes were lost on the merits, as the merits were evaluated, rather than because off partiality, lack of industry or incompetency of the courts. While the defeated litigant may and usually does question the wisdom of a jury, he seldom questions its integrity. His general attitude in respect of an adverse verdict is one of disappointed resignation. He has had his day in court. He reluctantly accepts the verdict and asks his lawyer whether he can win on appeal.

Against the backdrop of tradition and impaired confidence in the judiciary briefly sketched, contrast the attitude of the litigant, disappointed in a jury's verdict, with that of a litigant which inevitably would follow an adverse determination by a judge, sitting without a jury,

> whom he saw walking down the street with his adversary's lawyer;
> or by a judge whom he saw joking at the bench or in the corridor with the lawyer for "the other side";
> or by a judge whom he knew to be a member of a social club to which an officer or counsel for an adverse corporation belonged;
> or by a judge prominent in activities of a church of religious faith different from the faith he professed;
> or by a judge of a different race or different national ancestry in favor of one of the same race or nationality.

Human nature must undergo radical change if confidence in a judicial system thus administered could be retained in the society we are proud and happy to call the United States, made up, as it is, of people of diffferent national and racial origins. It is more important to the people of any state and to the welfare of the nation that litigants believe they have evenhanded justice than that they be afforded more speedy trials—desirable as the latter may be.

It is no disparagement of judicial officers to assert that they are not as well qualified to pass upon questions of fact in negligence cases as are juries. Mr. Justice Hunt in an unanimous opinion of the Supreme Court of the United States stated:

> "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from

admitted facts thus occurring, than can a single judge."[3]

All judges are not equal in learning, industry, patience and experience. Experience of people in the ordinary affairs of life differ. Some judges have had wide experience; others have led rather cloistered lives. All of us are creatures of our own experiences and environment; all of us have sympathies, antipathies and prejudices which consciously or unconsciously affect our viewpoint.

It doesn't take an astute lawyer long to learn the strength, sympathies, vagaries, antipathies and prejudices of trial justices. Everyone of you has seen your adversary play upon them—sometimes ad nauseam. If the determination of negligence actions —which call into play the emotions to perhaps greater degree than any type of case other than will contests and criminal cases —is to be made by judges without juries, it will take the bar but a short time to catalog the triers of fact and more ingenious devices to avoid some judges and appear before others will be devised than heretofore have been known, even though that gamut may be thought to have been run.

Contrary to assertions of proponents of repeal of the right to trial by jury, the jury system is not the cause of "the law's delay", nor is it a substantial factor in calendar congestion.

Time will not permit of discussion of the real causes of calendar congestion but they are not attributable to the jury system. The time of a trial justice consumed in trial by jury of the ordinary negligence case is no greater than the time that should be consumed in a trial by a judge without a jury.

Unless the judge who hears, tries and determines negligence cases without a jury is to make snap decisions, which will not be assumed, there must be deducted from the time consumed in opening, summation, and charge to a jury and receiving its verdict, the time expended by him in reviewing his notes, examining exhibits, weighing the evidence, reviewing the law in some cases, and making his findings. Many conscientious judges in arriving at a decision would take an amount of time equal to and in some instances greater than the time occupied in opening, summation and charge to a jury. Any judge who took an average of less time would be in danger of failing to do justice to the parties with resultant delay in justice by appeals that otherwise might not be taken.

Public confidence in the integrity, competency and impartiality of judicial officers is essential to the stability of our system of government. People may be indifferent to charges of misfeasance or nonfeasance of members of the executive or legislative branches of government, but suspicion concerning the judiciary produces widespread concern.

The right is a bulwark against intemperate, arbitrary and capricious action. It is true, of course, that there is now no foreign monarch to accuse of oppression but let it not be too lightly assumed that invasion of freedom must come from a foreign foe. There are those in high places in our own land who believe their efforts to attain social betterment, as they envisage social betterment, should not be blocked by "outmoded" provisions of the Constitution; who believe that the people must be taught to think, not in terms of law and government, but of morals as they conceive morals; who are restive of constitutional restraints upon their attempts to change economic and social conditions to patterns they deem better suited to the national welfare. It has been said: "It is curious that the greatest onslaught upon our liberties must be attributed to the aspirations of virtue rather than to those of iniquity."

Trial by jury is a right for which our forefathers fought and, once surrendered, a right for which our children or our children's children again will fight. Pressure to abolish that right should be resisted by all the forces at our command. May history not record that the lawyers of our day were less diligent or zealous to protect rights of the people than were those lawyers who insisted that the right to trial by jury be guaranteed by the Constitution they and their colleagues hammered out on the anvil of experience. [Applause]

CHAIRMAN EIDMAN: Thank you very much, Mr. Runals, for a very fine talk on a very timely subject.

Our next speaker comes here to us from the University of Chicago, Professor Harry Kalven, Jr.

Professor Kalven received both his A.B. and his J.D. degrees from the University of Chicago, graduated from the law

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[3]Sioux City & Pacific R.R. Co. v. Stout, 17 Wall. 657, 664.

school there in 1938. He practiced law in Chicago in private practice until 1942, at which time he entered the armed services of this country. After serving, he returned to the law school as a member of the faculty and became a full professor in 1952.

His principal field of teaching is in the law of torts and he, in connection with other professors, has been, and is now preparing a casebook in that field.

Since 1955, Professor Kalven has headed the jury project. While he will explain to you in more detail the workings of this project, I might say very briefly that it is a project which is financed by the Ford Foundation. It is a research project. It has been going on now since 1955 and it is my understanding that it has some several years, perhaps as many as five, still to go before the research is completed.

I will leave it to our speaker to explain to you exactly the type of research that is being done in the field, which will be most interesting to us. Professor Harry Kalven, Jr.! [Applause]

A Report On The Jury Project of the University Of Chicago Law School

HARRY KALVEN, JR.
Chicago, Illinois

I

THE JURY project of the University of Chicago Law School is one of three studies the school is currently undertaking in the field of law and behavioral science. The other two studies involve commercial arbitration and public attitudes toward taxation. In a general way the three studies are related. For example the jury study and the taxation study are concerned with different avenues through which public sentiment and opinion make themselves felt in government and law; the arbitration study and the jury study are concerned with different ways in which particular controversies are adjudicated. And all three studies reflect a systematic effort to apply the techniques and insights of the social sciences to problems arising within the legal field. The program has been viewed since its inception as a partnership between law and social science in the sense that it would if successful enrich both areas.

From the outset the problem has been viewed as involving much more than the literal application of existing social science generalizations to specific legal phenomena. For the law does not state its problems in the language and concepts of the social sciences and the social sciences do not have ready at hand propositions about human behavior that are directly applicable to law. What was involved primarily therefore was not the collation of existing scientific literature but the collection of new data which was to be sought and to be analyzed by a staff sensitized to its relevance both to law and to behavorial science.

From the outset therefore the program was centered on the interdisciplinary study of living legal institutions. The complex of problems that would arise in carrying out such study within a professional law school were accurately put in the original submission to the Ford Foundation. "The program which is suggested," we there said, "requires interdisciplinary research. Inter-disciplinary research, while often most fruitful, is also most difficult organizationally as well as conceptually. The suggestion is that by concentration on actual situations which raise simultaneously legal and behavioral science problems, some of these difficulties will be obviated. But those who have had experience with this kind of work surely will attest to the fact that it is of great importance to have a group so situated that its members learn from one another, and with projects so arranged that techniques and data relevant to one may also be relevant to another. Since communication between the disciplines and the participants cannot be in terms of the concepts and techniques of only one discipline, the conceptual schemes and research techniques must be developed

in the course of the work itself. This means that a centrally located staff with time to live and learn in frequent informal communication is of the essence of the program."

For the law school then the program was a major experiment in the administration of large scale collective research as well as an intellectual experiment. There is much in our three years of experience which is relevant to the issues under discussion at this conference; relevant, that is, both to the potentialities and the stubborn costs of such enterprises. It is not my purpose to discuss these aspects in detail today. I wish to record only that we have found the development of an atmosphere of genuine collaboration, the formulation of common problems and common emphases, and the maintenance of the program as an integral part of the day to day life of the law school community a slow, costly, sometimes painful process. And also that we have found it a process of exciting growth.

I should like to review with you today some aspects of one of the projects, the study of the jury. Our work is at various stages of maturity from tentative suggestions for future studies to units in the process of write up for final publication. In the process of formulating common problems and developing techniques of inquiry, the jury project has moved in many different directions and moved at uneven pace and with uneven success. I cannot hope to do justice to the particular subprojects I shall comment on. They will be and deserve to be fully reported in their own right. I can however hope to convey some sense of the scope of the undertaking, of the rich variety of the methods it employs, and of the implications it holds for the study of the social sciences, the study of law, and the administration of justice.

II

Perhaps the place to begin is with the relationship of legal research as we conventionally know it to the project. Our views and emphasis on this have undergone change from time to time. It was at one stage contemplated that a parallel restatement of jury law in full would accompany the social science research. This however soon proved to be a legal research job of almost insuperable magnitude, and one which did not urgently need doing because of the abundance of excellent legal scholarship on various aspects of the jury already published. As we now see it therefore, the primary emphasis is avowedly on the basic research—on, that is, the systematic collection and analysis of new data about jury behavior. A substantial number of research memoranda have been prepared for inter-staff use and guidance; and all published field studies will be supported by studies of the directly relevant law. An impressive bibliography of the existing literature on the jury has been compiled and consideration is being given to its eventual publication. A limited number of studies in comparative law including one on the lay judge under German law and one on the awarding of lawyer fees have been undertaken. A preliminary study has been done of the notable decline of the civil jury in England and it is hoped to do a substantial study of this within the next four years.

The debate about the merits of trial by jury, which as you know has gone on at a lively pace for over one hundred years, has been carefully reviewed and has served in part as a source of hypotheses for study. The debate, I might add, shows that every criticism of the jury quickly finds an equally vigorous defense, and that to an amazing degree the contemporary debate echoes points made a century ago. The debate is among other things a reminder of how many untested assumptions of fact are part of orthodox legal controversy. Conflicting assumptions as to the role and behavior of the jury have shaped much of our substantive and procedural law. The study of the jury is therefore also the study of the meaning of wide segments of substantive law.

One facet of the law will receive special emphasis in the career of the project as a whole. There is good reason to believe that although we inherited the jury from England it has developed in many respects as an indigenous American institution. The American jury appears to offer an unusually rich opportunity for work in American legal history. The jury in its relation to the judge, as you know, can be viewed as a system of checks and balances. The changes in the various rules defining the respective spheres of judge and jury can be traced against other developments in American politics over the past century and a half. A promising start on this sort of legal history has been made and further research leading to substantial

publication is now definitely planned.

III

As one turns to the jury as a topic for empirical study he is met with the conflicting reactions that there is a poverty of usable legal theory and an abundance of specific legal hypotheses to test. The reaction is not hard to explain. The law does not tell us what kinds of cases the jury is best suited for and what kinds of cases it is not. The rules for when the jury is available, as a matter of constitutional right, although much litigated, are entirely technical and historical. The relatively recent Federal Tort Claims Act which does not provide for jury trial is an excellent example of the point. We thus have personal injury cases in which the jury is not available which are similar in all respects except that the government is a party to the traditional cases in which the jury is available.

There is another aspect of this basic difficulty. There are current among students of law a variety of views as to the functions now intended for the jury. Perhaps the central ambiguity turns on how much community sentiment and lay common sense the jury is intended to infuse into the system. How much can and ought jury equity and common sense be controlled by rules of law and procedure? Or to put this another way just how much like the judge's decision does the system intend the decision of the jury to be? These questions are not of course literally answerable by deductions from the existing rules of law and they quickly translate into familiar issues of debate about democracy, the rule of law, equity, change, the role of the expert and so forth. The point therefore is that both the collection and interpretation of data about jury behavior must be in the context of the fluid and multiple and conflicting functions the jury is thought to be performing. The simple question: how well does the jury do what it is supposed to do and how might it be strengthened is thus seen to be a remarkably complex series of questions.

At a second level, however, the problem is one of embarassment of riches. If the law has no clear big ideas about the jury it supplies countless specific hypotheses suitable for testing where the point of testing is not so much to evaluate as to see whether the specific change makes any difference in jury behavior. These issues vary greatly and range through the entire fields of substantive and procedural law where the jury is used. Should jurors be permitted to take notes? Should instructions be taken into the jury room? What happens if, as has been true in a surprising number of states, the requirements for juries of twelve and for unanimous decision are relaxed? Does the jury award attorney fees when it is not told not to? Does it understand instructions on proximate cause? Does it discount damages by its doubts as to liability? Questions of this dimension are virtually inexhaustible and each is relevant and of interest to some phase of law. The problem of selection is therefore formidable. At one stage, the project staff compiled a thirty page outline of possible points for study, all of which were relevant and interesting. As a friendly critic observed the outline contemplated at least a hundred year project. The strategy therefore has been one of slowly feeling our way rather than one of executing an iron clad agenda. We have learned a good deal about the relative accessibility of different problems to direct research and about the relative costs of testing variable x rather than variable y. Beyond this our aim is now to do a study which will necessarily leave many things untouched but will be complete in the sense that it will contain specific studies in all of the main categories of the overall problem.

IV

So much then for generalizations about orientation and approach. I should like for the remainder of my discussion to review with you certain specific work now in progress. I have elected to organize the discussion primarily in terms of the various research approaches that are being used in order to highlight the versatility of the methodology. But I hope that as the discussion proceeds a fair sample of the kinds of substantive questions we have been concerned with will become sufficiently apparent.

A convenient starting point is afforded by considering first the intensive observation of the individual jury trial. The method has been to have an observer present at all stages of the trial from *voir dire* on, to have him interview the judge and counsel, and most important to have him interview upon the completion of the trial each of the jurors individually and at some length. This has been done with the con-

sent of all concerned including judge and juror, and with the understanding that appropriate safeguards to preserve anonymity will be used. Detailed observations of some eighteen cases have now been completed and are in the process of write-up. As yet there has been no publication. The completion of this first set of observations has been a major undertaking in itself and the processing of the mountain of data thus obtained has proved formidable indeed.

The material has proved to be of extraordinary richness and interest, but it has long been apparent that the effort to make such complete observations on a scale that would have significance statistically would be prohibitively expensive in time and money and perhaps impossible in any event because of the differences between any two trials when compared in their entirety.

These studies remain however impressive in their own right and of the greatest value to the project as a whole. The first use of the material is that it permits us to draw the complete picture of the single case in its entirety and with all of its idiosyncrasy. The total case sets the perspective for the other parts of the project by pointing up the extraordinary complexity of the individual jury trial, and the countless number of variables that might have influenced the result in this one case. The role of scientific study of jury behavior is therefore kept appropriately modest; it is not a matter of explaining fully how the individual case came to be decided as it was, but a matter of isolating variables and testing for their influence in terms of probabilities.

The full portrait of the single case is rich in the human quality of the jury endeavor. There is perhaps a point here where the law touches the humanities as well as the social sciences. The individual case study has a literary merit and a dramatic impact and evokes the imagination in much the same way as the good novel. And we have found this as true of what appears to be the routine negligence case as it would be of the celebrated criminal case. There may well be in such materials an important source for supplementing the conventional materials of law teaching and an important way of giving the student a vivid sense of the lively reality behind the law he reads.

The material serves further to provide instances of jury behavior which are sources of important insight. We are utilizing the material for a series of essays on specific problems of jury administration which cuts across the individual cases and which draw upon the kind of superior anecdote, if you will, provided by intense observational study. Some of these insights will be amenable to further systematic testing but many will serve their purpose if left at the level of the reflective essay. On many issues our prior knowledge about jury administration can be enriched by illustrations of actual behavior without our knowing how frequently such instances occur.

Perhaps a few illustrations will make clearer the refreshing impetus toward generalization that this data affords. In one instance there had been considerable conflicting expert testimony about which way a car would turn if it suddenly had a given mechanical defect. In the deliberation, as we reconstruct it, the jury paid little attention to this expert testimony although it realized that the exact location of the cars at the time of impact was important to the ultimate decision. Rather the jurors were persuaded by the information offered by two fellow jurors that friends of theirs had driven cars with this defect and that the cars had turned to the left. Such instances open the perplexing question of the use of extra record information by the jury. This case material offers many additional examples. It is clear that the jury is meant to draw on its common experience with some frequency, but the line between appropriate and inappropriate use of such additional information turns out, on close inspection, to be a subtle one indeed.

A second instance involves the difficulty a jury had with the instruction to use evidence of prior convictions for impeachment only. The majority did not understand the point but one or two minority jurors did and kept insisting that the distinction be recognized. They finally succeeded in having the jury return to the court for clarification and in the end the distinction got across and the defendant was acquitted. Here at least three points of considerable significance are implicit. The anecdote corroborates the long held suspicion of the profession that instructions on multiple admissibility are not understood by the jury; it emphasizes the importance in having the court affirmatively

encourage the jury to return for clarification of instructions or of proof when dispute arises; and finally it supports the view that a jury will for many purposes be as intelligent as its most intelligent member; and accordingly that many feats of memory, etc., that the jury is asked to perform are seen as less difficult if it is true that the recall of a point by any juror may serve as the recall for the entire jury. And we are impressed with the high dedication many jurors bring to their task.

In a third instance the ambiguity of an apparently clear and simple instruction is revealed. Here the defendant driving in the right-hand lane of a three lane highway collides with a car parked on the highway and the shoulder and skids across the highway into the plaintiff's car. The defendant is charged with negligence in failing to respond to the emergency of the parked car. Among other instructions the court tells the jury that a motorist driving on a three lane highway has a duty of driving in the extreme right-hand lane, except when passing or making a left-hand turn. One juror precipitates a major debate in the deliberation by arguing that since the defendant was driving in the extreme right-hand lane, he was simply doing his duty and that therefore the instruction was tantamount to an instruction to find for the defendant. It appears that this crisis in the deliberation might readily have been avoided had the court explicitly correlated this instruction with the instruction it gave as to the motorist's duty to keep a proper lookout.

A final illustration touches the jury's perplexities as they struggle with contributory negligence as a total defense. In this instance the jury finds both the plaintiff and the defendant negligent. They are reluctant not to award some damages to the plaintiff, however, because they feel that the defendant still deserves some sort of official reprimand. They debate at great length as to whether there isn't some third form of verdict they could render which would indicate that they thought the defendant was negligent. They return to the court finally to ask if there is not some third form of verdict they could use. When told no, they go back to the jury room and finally find for the defendant. In all the jury deliberated some seven hours and it is estimated that the deliberation would have been shortened by as much as five hours had the jury's desire to reprimand the defendant without giving damages to the plaintiff found some legal outlet.

The technique of observation of actual cases we have thus far discussed has involved the observer being present at the trial, has been keyed to a detailed view of the particular case, and has involved lengthy interviews with each juror. A second method of approach has been to use relatively short interviews with jurors after service and has not been so tied to detailed information about the cases on which they served. The effort here has been to sample a much larger number of cases for certain types of jury behavior and attitude. One example of this has involved the interviewing of 500 jurors immediately upon the completion of their service. This survey has given us information on several points. First, it has enabled us to reconstruct first ballot votes in these cases and compare them to the final verdict. Second, the first ballot vote has been taken as a relatively good index of the individual juror's assessment of the case at the end of the trial and hence has provided a basis for correlating juror personal background data with the way he voted; and finally it has furnished information on the juror's attitude toward jury service after his exposure to it. We are planning presently a comparable interview schedule to be given to jurors upon completion of their service in civil cases. The point to this method then is that although it does not yield detailed information about the content and interplay of variables in the particular case, it does provide a way of obtaining statistics about certain broad and important aspects of jury behavior.

You will, I think, be interested in some of the preliminary findings. We have been concerned, in our own thinking about the jury, with the process by which unanimity is reached, in the degree to which the deliberation produces real changes in position, in the differential opportunities for adjustment and compromise that different types of cases afford the jury, and in what the consequences of relaxing the unanimity requirement are likely to be. The study discloses that in some 71% of the cases the jury was not unanimous on the first ballot and that in some 36% the split was at least 8 to 4. What then is the ultimate fate of the minority view? Does it ever prevail? Does

it hang the jury? Or does it always slowly yield? In 90% of the cases in which a majority voted guilty on the first ballot, the verdict was guilty; in 97% of the cases in which the majority voted not guilty on the first ballot, the verdict was not guilty. In the few cases in which the jury was evenly split on the first ballot the final verdicts were guilty in 60% of the instances and not guilty in 40%.

A second preliminary result is that the only instances of hung juries were in cases where the initial vote showed a substantial minority. There were no hung juries where the minority originally was one or two. Hung juries as you perhaps know are relatively infrequent. It has been surmised that they result chiefly from the personality of the "hanging juror" and would be eliminated by relaxing the unanimity rule. The figures suggest the competing hypothesis that the hung jury is a function of the closeness of the case itself and perhaps of the moral support that a man feels when his minority view has at least several other supporters.

It is worth emphasizing that such data does not however give unequivocal advice about retention of the unanimity rule. If the rule is intended as one more safeguard for the defendant in the criminal trial it may perform its function if only once in 100 instances a minority finally persuades the majority to acquit. And if the rule is designed to compel a minimum of deliberation before the final verdict is reached it achieves its purpose regardless of the final outcome.

A second aspect of this survey has been to give information relevant to one of the central questions about the jury; what difference to the result does it make who serves on the jury? How much, that is, do jurors differ from each as decision makers? The question poses the familiar issue of whether the ideal is a representative jury randomly chosen from the population as a whole, or a jury that is in some sense specially qualified. I shall pause for only one illustration here. The interview asked three of the questions used in New York to qualify blue ribbon juries, namely, whether they had scruples against the death penalty, whether they would convict on circumstantial evidence, and whether they would draw a negative inference if the defendant failed to take the stand. One by-product was the discovery of how few jurors understood what circumstantial evidence was. But the main point was to compare the first ballot votes of the jurors who "qualified" under these three questions with the jurors who did not. The first ballot votes were weighted by giving them the weight of the opposing vote. For example, if the original vote was 11 to 1, the lone dissenter received a score of 11 and each of the majority received scores of 1. The tentative finding is most accurately stated in terms of the probability of a juror voting guilty on the first ballot if the first ballot vote is split 6 to 6. In these terms it appears that whereas the odds are 48 in 100 that the ordinary juror will vote guilty, the odds on the "specially qualified" juror are 55 in 100. If these tentative conclusions stand after further testing they will make a contribution to, although they will not decide, the difficult policy questions raised by the blue ribbon jury.

A third segment of the study is concerned with attitudes toward jury service. Briefly, the results show that of the jurors who actually sat on a case and did not suffer an economic loss, some 80% would like to serve again; whereas if they did not get to serve on a case and did lose money as a result of service, some 48% would like to serve again. Further if they lost money but did sit, the percentage rose to 62% and if they did not sit and did not lose money it rose to 73%, and when asked what suggestions they had for improving the system, 32% of those making suggestions favored elimination of waste time and 21% favored more pay for jurors. These figures then indicate generally an affirmative response to jury service and point up the two well known burdens of such service: the waste of the time of the juror who is called but rejected repeatedly on *voir dire*, and the economic loss that jury service may entail for some citizens.

We have several other lines of information on the general question of attitude toward jury service. One source has been an intensive public opinion survey of attitudes toward the court, jury and administration of justice generally in a moderately sized city. A sample of those who had had jury service in the last year and a sample of the general population were interviewed. The results of this survey are in process of analysis; consideration is being given to doing comparable studies in other communities.

The survey discloses that some 6% of

the general population had had jury service at some time during their life and that 3% had their only direct contact with the court system as a result of jury service. However some 50% had been in court in some capacity, including 23% who had been a party to litigation and 21% who had been witnesses. On the other hand some 55% of the public had known someone who had been a juror. Although it is estimated that some one million Americans serve on juries each year, it would appear that jury service is no longer, if it ever was, the dominant avenue for direct citizen contact with the court system, but does remain an important source of indirect contact.

The study contains some striking data on the impact of jury service. Among those who had never served, only 36% said they would like to serve, 16% were undecided and some 48% said they would not like to serve. However among those who had served within the last year 94% said they would like to serve again, 3% were willing to serve again as a duty and only 3% said they would dislike it. These figures cannot be read as indicating that 46% changed their view of jury service after serving. Because of the opportunities for avoiding service, those who do serve in effect choose to do so and are very probably more favorable to the jury at the outset. Thus some 79% of this group indicated they were favorably disposed to jury service before they were called; however some 15% did shift from an unfavorable to a favorable view as a result of serving. Some basis for a reversal of attitude seems to be found in the reasons given for disliking jury service in advance. These reasons go largely to the person's uneasiness about judging others, about undergoing a strange new experience, and to diffidence about his competence. These are reasons which might understandably be dispelled by the actual experience and by its compensating opportunities for excitement and participating in something serious and important. They corroborate our overall impression that most jurors are exceedingly serious about their job. A tentative conclusion, therefore, is that although in many communities people notoriously seek to avoid jury service, once they are required to submit to it they find it a rewarding and significant experience.

The study also probed along a second line. Respondents were asked, "Which do you think is the better way to have a case decided?" Among the general public some 70% favored the jury, 21% were undecided, and 9% favored trial by judge alone. Among those who had had jury service within the past year 77% favored jury trial while those favoring bench trial rose to 15%. We have also a comparable set of figures as part of a juror questionnaire given to federal jurors in the Tenth Circuit on which our staff collaborated with a special committee of the bar. Here prior to service some 65% favored jury trial and after service the figure dropped to 58%; conversely prior to service 23% favored bench trials and after service the percentage rose to 33%. However while 19% of those originally favoring a jury shifted to a judge trial after service, some 17% of those originally favoring a bench trial shifted, after service, to a preference for jury trial.

The respondents showed some tendency to discriminate the type of case in which they preferred a jury. Thus when asked specifically, only 5% of the sample of the general public preferred a judge in criminal cases as against 28% in contract cases. And for those with recent jury service 10% preferred a judge in criminal cases as against 55% in contract cases. These refinements suggest that the general question about preference for judge or jury trial may be frequently understood by the respondent as a question about criminal trials and further that jury experience tends to make one more enthusiastic about the jury in a criminal case and less enthusiastic about it in the contract case.

Finally, we have some evidence coming from our use of experimental juries to which I will turn in detail in a few moments. The jurors who were given an experimental negligence case to decide were asked whether they would prefer judge or jury trials in a negligence case if they were the plaintiff and if they were the defendant. Those who would prefer trial by judge in both situations gave mean awards in the experimental case of $14,000. Those who would prefer trial by jury in both situations gave mean awards of $38,000. The data thus suggests strongly the interesting conclusion that preference for trial by jury in negligence cases may tell us

something about the person as well as about the jury.

Before turning to the experimental jury work I should like to say a few words about five other projects. The first of these is a study of jury waiver which we plan to put into the field soon. As you know, one of the great changes in the jury system over the past century has been the granting of permission to the parties to waive a jury. This is true in all civil cases and with certain qualifications about when the consent of the government is required in criminal cases as well. As Judge Curtis Bok has observed, the jury thus rests today on the voluntary choice of the litigants and we continue to use it because the litigants continue to want it used. Our interest in waiver is of two sorts. We should like to draw as accurate a profile as possible of the actual use of jury trial today. This is largely a matter of refining existing court statistics and some useful data has already been published by others. But more important we should like to find out why in the particular case the lawyers elect to have or not to have a jury trial. The study proposes the intensive interviewing of lawyers as to their specific choices. Although it is anticipated that many considerations of overall strategy enter into such choices, it is hoped to gain additional insight into the lawyer's image of the competing advantages of jury and bench trial and his view of the precise functions of the contemporary jury.

Two studies concern jury selection itself. In each, the objective has been to find out how in fact the various steps in the selection machinery operate and how the final population which gets to serve compares with the population as a whole. One study of a county indicates the many stages of selection likely to be found in an urban selection system today. The county starts with a list of registered voters. To begin with, some 25% of the population of the county are not registered voters and are automatically left out. Of the 4,234 chosen at random from the voter lists who were sent questionnaires by the jury commissioner in 1953, the year studied, only 2,656 returned the questionnaires. Of this total only 1,323 were qualified by the jury commissioner after interview. And of these only 559 finally served on grand or petty juries. Thus only 13% of the original sample in the end actually served. The chief reasons for the attrition among those who return questionnaires are not the legal exemptions which affected only 4% of the candidates but the discretion exercised by the jury commissioner, by the court in granting excuses, and by the lawyers on *voir dire*. Without pausing here for the details it might be noted that the population of those who actually serve does differ to some degree from the population who returned questionnaires: there is a marked increase of women over men, a fairly marked reduction in both those with much education and those with little education, and some increase in the relative percentage of lower income groups as against middle income groups.

A fourth study, still somewhat at the blue print stage, is contemplated of the *voir dire* process. The plan is to get more precise statistics on the impact of *voir dire* on selection, to chart more exactly how much of a juror's time is actually spent in service, and to interview lawyers as to the detailed reasons for their exercise of peremptory challenges in particular instances. It is probable too that some use will be made of the experimental jury in this connection by running mock *voir dires* and comparing the performance of the jurors who were challenged with the performance of those who were not challenged.

The fifth study is an effort to get more systematic knowledge about the regional variations in jury awards throughout the U. S. It is of course well known that there are high and low award areas but the problem has been to get more precise measurement of the variations. A preliminary effort to compare the some 1,500 appellate cases in which personal injury damages were reviewed on appeal in the past decade proved unsatisfactory because the cases were too dissimilar. The study utilizes the estimates of liability insurance adjusters as circumstantial evidence of the level of jury awards in their immediate areas. Six model cases have been submitted to the adjusters who are asked to indicate the top figure they would settle for rather than risk a jury trial. Thus, in effect the same six cases are "tried" all over the U. S. Some 600 adjusters in three insurance companies with national coverage have co-

operated thus far and some preliminary results of considerable interest are emerging. For example, tabulating the average award by region and by city size shows that awards are higher in the east and west than in the south and central states by a difference of 10% to 20%. Further, in each of the four regions the award is highest in cities with populations of over 500,000 and lowest in cities below 25,000 again by a difference of approximately 20%. And at the extremes there is a 50% difference between the award in an eastern city of over 500,000 and a central state city of under 25,000. The lawyer's hunch that San Francisco gives higher awards than Los Angeles and that Brooklyn gives higher awards than Queens is corroborated in this study by findings of an approximately 20% difference in each instance. It is planned at a later stage of the jury project to test these findings further by using experimental juries at places where the regional variation is marked.

V.

A major facet of the project as a whole has been the development of the experimental jury. Recordings of mock trials based on actual trials have been prepared and with the consent of the court have been played to jurors who are invited to participate in the experimental deliberation by the court. By means of this experimental technique we have been enabled both to repeat the same trial before several juries, and by the comparison of the verdicts and deliberations of groups which have heard different versions of the same trial, to test the effects of a given change. As a result a powerful technique for exploring the impact of substantive and procedural rules of law on jury behavior under conditions reasonably like actual trials but with the rigorous controls of experimentation is emerging.

In addition the experimental routine has made possible with the consent of the jurors the full recording of the deliberations. We are thus amassing an invaluable collection of transcripts of deliberations and have the unique opportunity to watch the differences in the deliberation processes of different juries deciding the same case. Finally the experimental set up has permitted us to interview the jurors extensively and at various stages of the case. Thus they have been asked for their individual decisions at the end of the trial and just before commencing deliberation, and again upon completion of the deliberation they have been asked to give the decision they would now prefer. The combined resources of the experimental technique have given us we believe unprecedented access to the meaning in operation of rules of trial practice. Three moot cases have been developed thus far and have been played to over 50 juries. We are proceeding at the rate of approximately two runs per week and we will shortly have the responses of more than 1,000 jurors to the experimental routine.

The reactions of the jurors afterwards and their behavior in the moot deliberations indicate that in the vast majority of instances they become fully involved in the enterprise. We had one jury deliberate for four hours and go home to return the following morning for another three hours. We have had hung juries. We have had a case in which a juror to reduce the intensity of argument between fellow jurors feels obliged to remind them, "Of course, actually we are not trying the case, it's already been decided." The transcribed mock trials running for 60 to 90 minutes with a dozen or so witnesses prove to be remarkably complex. They are long enough to introduce some degree of loss of attention and the testimony cannot be quickly and totally recalled. Because the transcribed case does not permit the many recesses and lulls of the actual trial, it is more concentrated than the time suggests and is probably the equivalent in coverage of a trial lasting three to five hours. I should like to quote briefly from the deliberation in a case where the jury finally hung. The recording conveys in the tone of the voices the intense commitment of the participants more vividly, but I think the point will be made. The foreman is addressing the hold-out woman juror after something over an hour of deliberating:

F: If we brought in for the plaintiff a figure under 65 and above 50 would you sign it?

W: The others wouldn't want to agree to that because . . . .

F: That's not the point.

T: That's not the point. He's asking you . . . .

F: Well, if we, eleven of us are agreeing. Now I'm asking you if there is any

possibility of you signing a verdict of above 50,000.

T: We are agreeing.

W: No, I don't feel that's the proper attitude to take. Nothing will change my mind if I do not, if I feel that the case isn't . . . You can bring up a point. . . .

F: That's all I want to determine now. Whether we call this gentleman in and tell him we're a hung jury or whether we are going to reach a verdict in . . uh . . a fair amount. Now if you feel that any more discussion might change you to raise your figure from $50,000 . . .

W: If you bring out more facts that I overlooked. . . .

F: I can't bring out any more facts, M'am than you heard in the evidence presented. . . .

W: I mean those.

F: That's right. Now eleven of us heard the evidence that we figure that 65,000 would be fair. Do you think that we can in discussing this any further might raise your figure or do we call the gentleman in and tell him that we cannot reach a figure . . uh . . a fair figure and that you will not . . . because you won't sign it. Do we tell him that or don't we?

I shall attempt here only a few illustrations out of the data from the first experimental case. The case involved an auto accident in which the plaintiff, a 40 year old stenographer, was injured when the car in which she was riding as a passenger collided at an intersection with the auto driven by the defendant. The facts were strongly suggestive that the defendant had been negligent in going through a stop sign at high speed. The testimony shows further that the plaintiff suffered a fractured leg and other injuries and had accrued medical expenses and loss of wages at the time of trial. The chief point of controversy, however, was the degree to which she was permanently disabled, and on this there was sharply conflicting medical testimony.

The experimental design permitted us to test the effect of several variables at the same time. In three treatments, liability was very clear; in three it was made somewhat ambiguous by modifying the details about the defendant going through the stop sign. These versions were then combined with three different treatments of defendant's insurance. In the first, defendant on cross examination reveals he has no insurance, but there is no objection or further attention paid to the disclosure; in the second, the defendant reveals on cross examination that he has liability insurance, the defendant's counsel objects, and the court directs the jury to disregard this testimony; in the third treatment, the defendant again discloses insurance on cross examination, but there is no objection and no further notice is taken. By combining these two variations of liability and these three variations of insurance disclosure, we get six different versions of the basic case which differ however only in these respects and are otherwise identical. The tapes were then played to sets of juries operating under the unanimity rule and to sets of juries operating under a ¾ majority rule. In all the experiment was given to 30 juries giving us 30 verdicts to score and 360 individual juror pre-deliberation and post-deliberation awards as well.

I should like to indicate very briefly some of the results. First, 28 verdicts were in favor of the plaintiff, one jury hung on the damage issue, and one jury found for the defendant. Second, the mean award of all verdicts where liability was clear was $41,000; the mean award of all verdicts where liability was somewhat ambiguous was $34,000. This supports the conclusion that the jury tends to combine the liability and damage issues and confirms a long held suspicion of the bar that the amount of damages awarded is a variable of the clarity of proof of liability as well as of the clarity of proof of damages. The process is a complex one affecting both the compromise adjustments in the deliberation and the individual juror's own judgment about the quantum of damages. Thus the mean pre-deliberation awards of the individual jurors reflect an almost identical reduction of damages in the treatments where liability has been made ambiguous. Third, no significant difference in award level resulted between juries operating under the unanimity rule and juries operating under the ¾ majority rule.

Fourth, there are the results of the three insurance treatments. Where the defendant disclosed he had no insurance the mean award of all verdicts was $33,000; where he

disclosed he had insurance but no further notice was paid to it by court or counsel the mean award rose to $37,000; and where the defendant had insurance and the jury was explicitly told by the court to disregard it, the mean award rose to $46,000. Further, these regularities were equally prominent under each of the liability versions of the case scored separately. The subtlety of the jurors' response to insurance is indicated by two other lines of data. The mean pre-deliberation awards of the 360 individual jurors did not reflect the same sequence; the awards going from $34,000 to $40,000 to $39,000, a difference for which we do not as yet have an adequate explanation. However, the post deliberation awards once again showed the highest award where the court had explicitly instructed the jury to disregard insurance. Finally, the deliberations were inspected and scored for the frequency of mentions of insurance under the three treatments. In the 10 deliberations in which insurance was disclosed but no notice taken of it there were a total of 61 insurance mentions, 46% of which carried an implication for raising damages; in the 10 deliberations where the court explicitly ordered insurance to be disregarded there were only 36 mentions of insurance, 19% of which carried an implication for increasing damages. We are tempted to conclude, therefore, that instructing the jury about insurance will tend to keep them from talking about it, but will also tend to increase the frequency with which they do something affirmative about it.

The insurance data throws some light on a familiar policy dilemma in the administration of tort law through the jury. There are a series of points on which the law is clear such as insurance, counsel fees, nontaxibility of personal injury damages, etc., but on which it is most difficult to say whether it would be better policy to explicitly instruct the jury to disregard or, as is generally the practice today, to be silent on the point. Our data does suggest that the instruction on the forbidden practice tends to aggravate the consequence the instruction is intended to prevent. We have not as yet experimented directly with instructions on awarding counsel fees as part of plaintiffs' damages but the post-trial interviews with the experimental jurors indicate that some 38% did consider such fees and as a result raised their awards. And this is of course a frequent point of explicit discussion in the deliberations themselves, it often appearing that the jurors sense no impropriety in awarding such fees. The data on the tax point is slender but indicates that some 5% of the jurors raised the award on the double misconception that it was income taxable and that they were permitted to increase damages accordingly.

One further point of general interest to tort law is suggested by this first experimental routine. It will be recalled that the plaintiff was a passenger in one of the colliding autos. There was some possibility from the testimony of concluding that her driver was also negligent. The jury was given a standard instruction against imputing the negligence of the driver to the plaintiff. But the deliberations on occasion suggest that imputing negligence is a more popular sentiment than the law recognizes and some 23% of the jurors in post-trial interview indicated they had considered the point and had lowered the damages as a result. It appears too from inspection of the moot deliberations that the jury may reach its result not by charging the negligence of the driver to the passenger directly but rather by saying that since both drivers are negligent the damages should not all be assessed against the one who happens to have been sued. This preliminary data is thus suggestive of the difficulties in application of certain basic tort concepts. The jury may impute negligence of a third party to the plaintiff but then use a comparative negligence approach to modify the damage awards, thus deviating in two respects from the law, but following a logic that has much to commend it.

You will recall the data on the high frequency with which first ballot votes in criminal cases coincide with the final verdict. The experimental data at least where damages are highly controversial indicates a quite different pattern. It is true that the mean value of all 30 verdicts and all 360 pre-deliberation awards is the same, namely $38,000. This does not mean however that the verdicts in individual cases are simply quotient verdicts, that is, the average of the twelve pre-deliberation awards. Inspection of the pre-deliberation awards on a case by case basis indicates

that there may be very considerable adjustment of views in the deliberation so that the final verdict may differ substantially from the mean pre-deliberation award of those twelve jurors. It indicates too, how difficult the jury's task of reaching consensus may be, given the initial wide divergence of views ranging from no liability at all up through awards of $100,000.

A closely related point involves the comparison of the pre and post-deliberation awards. The similarity of the post-deliberation awards to the verdicts is a measure of the growth of consensus during the deliberation and conversely the difference can be taken as a measure of the degree of compromise effected during the deliberation. Further the comparison of the pre-deliberation award to the post-deliberation award can be taken as a measure of the degree of persuasion achieved by the deliberation discussion. I shall not pause for the details of such comparisons here, but the point is that the experimental routine appears to offer an excellent framework in which to work toward a general theory of the impact of the group deliberation on the individual juror's judgment.

We have, as I said, worked up three experimental cases. A second involves the defense of insanity in a prosecution for housebreaking. It stems directly from the celebrated *Durham* case decided last year by the Court of Appeals for the District of Columbia and seeks to test the difference in jury response to the traditional M'Naghten definition of legal insanity in criminal cases and the new and controversial mental defect test put forward by Judge Bazelon in the *Durham* case.

A third case involves questions of manufacturer and retailer liability where a vaporizer allegedly causes a fire severely burning the infant plaintiff. Here damages are clearly substantial but liability is highly ambiguous and both negligence and warranty theories of liability are in the case. The principal variable sought to be tested here is the effect of interrogatories for a special verdict. In one set of runs the jury operates under conventional general verdict procedure; in a second set of runs the jury operates under special verdict procedure and is given 16 interrogatories; in a third set of runs the jury, again under a general verdict, is given no substantive instructions of law other than the instruction to do justice and equity. The first 18 runs of this experiment have now been completed and are being analyzed. I might, however, note an interesting development from the first deliberation. There is some evidence in the case on the point of whether the child's mother left the vaporizer on too long or used it in a dangerous way. The interrogatories deal with this question in two ways. They ask whether the mother was using the vaporizer in accordance with the printed instructions. They also ask whether the mother failed to exercise that degree of care which an ordinarily prudent person would have exercised under like circumstances, and if so, was this lack of care such that it became the intervening cause. In this first experimental run the jury after considerable difficulty answered "yes" to the following of printed instructions and "no" to the question of whether the mother's lack of care was the sole intervening cause. But in assessing the damages the jury apportioned the negligence in equal thirds among the mother, the manufacturer, and the drug company and therefore reduced the damages by two-thirds. The example indicates once again the powerful pull on the jury of the notion of apportioning fault among all those responsible for the damage, including the plaintiff. But, most interesting, it indicates that the jury was able to do this despite the interrogatories and without giving inconsistent answers to them.

VI

It has been repeatedly indicated in the discussion that a central question about the jury is the degree to which judges would decide cases differently than juries. And this is an appropriate point with which to conclude. We have had three converging lines of inquiry on the areas of judge-jury comparisons. The detailed individual case observations included you may recall interviews with the judge. We thus have for these eighteen cases the view the judge had of the case. A second line of inquiry has utilized the experimental jury routine. The experimental auto negligence case was given to a group of trial and appellate judges for decision. Several of the results are of interest. The mean award of the judges was

$32,500 as compared with the experimental jury average verdict for the same version of the case of $34,300—a striking similarity. You will recall that the juries gave their highest award in the variation where the court had explicitly instructed them to ignore the disclosure of insurance. The judges however gave their lowest award in this instance. However the judges' awards did vary with the presence or absence of insurance; the award going from $32,500 where the defendant was revealed to have no insurance, to $40,300 where the defendant disclosed he had insurance but no further notice was taken of it.

There is one further point in this data of possibly wide significance. There was considerable variation in the verdicts of the experimental juries, but the variation was markedly less than that of the individual juror pre-deliberation awards. The data thus tends to confirm the hypothesis that one consequence of having juries decide as a group of twelve is to cut significantly the variation in individual juror decision. The group thus acts as an important control device for moderating the possible eccentricity of individual juror judgment. Further, the awards of the individual judges varied approximately as much as those of the individual juries. There is thus some preliminary support for the engaging hypothesis that it takes a group of twelve jurors to produce as small a variance as the single judge. Or, to put this less technically, twelve jurors will tend to decide cases much more like the judge than would single jurors. I should add parenthetically that the experimental design has furnished a useful model for analysis of certain problems of jury administration by permitting us to repeat trials of the same case. One test of certain legal rules, therefore, may be their tendency to reduce the variation in jury verdicts in the same case and in that sense to increase the stability of jury decision making.

The major line of comparison of judge and jury decision making has been the questionnaire on which some 500 state and federal trial judges throughout the United States have cooperated. The judge is asked to enter on the questionnaire the decision he would have made in the case had there been no jury trial and to give certain additional information about the issues in the case, the procedures used, and his explanation when there is a divergence between his decision and that of the jury. It is understood that the information will be used for statistical purposes only. At present some 5000 questionnaires have been returned by the judges covering some 3000 civil and some 2000 criminal cases decided during the past year. The data is currently being analyzed and admits of considerable refinement but some preliminary results are now available for 1428 personal injury cases.

In 41% of these cases the judge and jury agreed fully; in 23% the judge would have awarded somewhat less than the jury and in 17% the judge would have awarded somewhat more than the jury; finally, in 10% of the cases the judge would have found for the defendant where the jury found for the plaintiff, while in 8% of the cases the judge would have found for the plaintiff where the jury found for the defendant. Thus in all, the judge favored the defendant more than the jury in 33% of the cases which is perhaps close to our expectation. But the quite striking and unexpected result is that the judge would have favored the plaintiff more than the jury in some 25% of the cases. The very widely held view that juries in personal injury cases are more plaintiff-prone than judges is thus shown to be a considerable oversimplification.

The various refinements of this data appear to be of interest. I shall give only a few illustrations. Thus if we consider separately cases where the jury found for the defendant we find the judge in agreement 82% of the time, whereas in cases where the jury found for the plaintiff the judge is in complete agreement only 18% of the time. However, in some 69% of such cases the judge differed from the jury only in the amount of damages and not on liability. Further in cases where the jury found for the plaintiff the judge would have found no liability but in 18% of the cases where the jury found for the defendant the judge would have found liability.

The data has been correlated with the length of the jury deliberation and shows that the percentage of judge-jury agreement is highest when the deliberation is shortest and declines markedly as the deliberation increases. A similar correlation

although not so marked appears for the length of the trial.

Again the data was run for state and federal judges separately and shows no significant change in the incidence of agreement and divergence.

One final illustration will have to suffice. The percentage of agreement remains almost constant whether or not written instructions are given the jury; whether or not the judge summarizes the evidence; and whether or not the judge comments on credibility or on the weight of the evidence. These have been highly controversial issues in recent years, but the data is strongly suggestive of the conclusion that, at least in personal injury cases, these procedural controls make the jury neither more nor less like the judge.

VII

I have attempted to review with you some illustrations of the work now in process in the jury project. I have of course been reporting the work of other men. I have tried to sample rather generously the range of work and I am aware that in the time available I have not done justice to any particular unit. I wish to acknowledge particularly the work of Professor Hans Zeisel and of Professor Fred Strodtbeck, who has supervised the experimental jury work, and of Professors Barton, Broeder, and Mendlovitz.

Much of the work commented on will be reaching soon the publication stage and can be more properly appraised at that time. I will however have achieved my principal purpose today if I have succeeded in conveying in some measure the magnitude of the project, the rich variety of its methodology, the wide ranging quality of its questions, the promise of its contributions to the study of law, the study of the behavioral sciences, and the administration of justice, and above all our sense of intellectual excitement about it. (Applause.)

CHAIRMAN EIDMAN: Thank you, Professor Kalven, for your very interesting talk. I am sure the legal profession is going to look forward with a great deal of interest to the publication of the results of your research.

Ladies and gentlemen, our next speaker is Tom Wassell, of Dallas, Texas. He received his legal education at Southern Methodist University and, since that time, has been associated with the Texas Employers Insurance Association, Employers Casualty Company, as attorney, claims manager and vice president in charge of claims. He is a member of the Texas and American Bar Associations and has been a member of the International Association of Insurance Counsel since 1945.

He was vice president of the International Association of Insurance Counsel in 1956 and has also served as chairman of the Workmen's Compensation Committee and is currently chairman of the Home Office Council Committee. He is going to speak this morning on "The Activities of the Southwestern Insurance Information Service." (Applause.)

Activities Of SIIS

THOMAS W. WASSELL
Dallas, Texas

I KNOW that I am not revealing new and vital information to you gentlemen when I point out that most of your clients—the writers of casualty insurance—have been suffering heavy underwriting losses since 1951, especially in automobile coverage.

It has been rumored that some of our more prominent companies are considering a new advertising approach . . . something like "we are a non-profit organization . . . not that we planned it that way; it just happened!"

Seriously, however, many industry leaders in Texas felt that continued losses were the symptoms of a condition that could be treated effectively by a public relations program. Out of this thinking in 1953 grew the Southwestern Insurance Information Service, Inc., hereinafter known as SIIS,

the purposes and activities of which I am to discuss with you.

Briefly, the organizational set up is this: A group of casualty companies doing business in Texas incorporated SIIS. Each company appointed a representative and bought one share of stock. The company representatives elected a president, vice-presidents, a secretary-treasurer, and five members to serve with the officers as a board of directors. Heading up the organization is an executive secretary, F. Darby Hammond. SIIS had, in the beginning, 15 member companies; now there are 59.

A pioneer in the field of public relations on an industry-wide basis was the Western Insurance Information Service, which was organized in December, 1952, in Los Angeles under the able leadership of Victor Montgomery, president of Pacific Employers Insurance Company. Twenty member companies participated in the early organizational work.

In 1953, a branch office was opened in Seattle, Washington, with the area serviced by the organization finally expanded to include California, Washington and Oregon. The executive secretary is now Mr. Albert Wood.

WIIS operates a speakers bureau, uses the media of press, radio and TV, as well as direct mail, to put across the industry story.

WIIS was especially obliging and helpful to the Texas group when it organized Southwestern Insurance Information Service. WIIS made available its charter, by-laws, early correspondence, and much material which was helpful. A good portion of this information was brought to us by James T. Blalock, vice president of Pacific Indemnity Company. His visit with us was very beneficial because of his experience as one of the founders of WIIS.

Since the early days, WIIS and SIIS have cooperated, endeavoring to aid each other in their common goals. Many Texas and West Coast companies are members of both groups.

The underlying causes of high underwriting losses are certain basic factors which are well known to you:

1. The large number of serious auto accidents.
2. The high cost of repairing automobile damage, and the high cost of medical services.
3. The increasing number of damage suits and the high awards made by juries in these cases.

The high cost of medical service and physical damage repair, represent pressures of an inflationary economy and there is little we can do about this situation, at least in a public relations effort.

But two factors, important ones, fall within the possibility of help by a public relations program, and it is toward these that SIIS has directed increasing effort.

You have read the statistics about the high incidence and seriousness of automobile accidents. You are all aware that the driving public must be made conscious of the fact that the automobile is a dangerous, killing weapon and that a driver's license in the hands of the wrong person is a permit to murder.

SIIS has communicated its messages via five media: namely, speeches, folders, radio transcriptions, television and press releases.

Very soon after the organization of SIIS, a speaker's bureau was established and staffed with able speakers from the 59 member companies. Too, many of our good attorney friends belong to our bureau. These dedicated workers have made speeches on traffic safety to more than 1,000 civic clubs, women's clubs, church groups, and trade associations since 1953. Titles vary but the theme is always the same. SIIS, which furnishes the speeches and the speaking engagement, is on record for stricter law enforcement, stricter licensing rules, driver education in all public and private high schools, and improved roads.

In these speeches, community groups are advised how to work for traffic safety in their areas. They are urged to sponsor driver education, and always, after the speech, a press release is sent out summarizing the message and giving credit to the speaker as well as to SIIS.

Program chairmen and club officers are circularized in SIIS's direct mail program so that it can secure more speaking engagements. Often, people read about SIIS in the paper and write us for a program.

High school assemblies are not neglected and neither are safety films. We have used the "Case of Officer Hallibrand", "The Fatal Step", and Walt Disney's "I'm No Fool on a Bicycle" with good effect.

SIIS makes safety folders available to speakers and to member companies. A recent one, "Race of Death", was built around the actual photograph of a teenage collision in Dallas on the first day of 1957. The young driver, I am sure, learned his lesson but neither he nor society will profit much since he is dead . . . at 19.

SIIS has also produced and circulated a radio tape called "The Price of Two Moments". The Texas radio stations are reminded of the tape by letter before major holidays and station managers write for the tape and run it as a public service to cut down highway accidents during peak driving periods. The response has been most gratifying. This past Christmas alone, 30 radio stations in Texas ran the tape at least once . . . many of them twice during the holidays. Prior to this, over 100 radio stations had run the tape.

So SIIS and other safety associations hack away at the barriers of indifference, carelessness and recklessness. The results, of course, are difficult to evaluate. However, one note of hope in a rather sad song is the fact that, although car registrations have greatly increased in the past five years, the accident rate has remained about the same.

Traffic safety, however, is the easy part of a public relations program. Everyone wants to save lives and everyone will cooperate because traffic safety is non-controversial. You can be for traffic safety if you're running for office just like you can be for God, fresh air and motherhood.

SIIS has discovered that, public relations-wise, the "more than adequate award" is a ticklish proposition to handle. Why? You gentlemen, with your courtroom experience, will know. If you oversell it . . . you sound unfeeling and hardhearted . . . you just don't take your public along with you. If you undersell . . . you just aren't doing any good.

In considering the problem, SIIS felt that a telling blow could be delivered if people were made to realize that they were handing out their own money . . . not the insurance company's money. It is never as pleasant to be a welfare worker with your own funds as it is with those belonging to someone else. SIIS also felt that an emphasis on the historic duty and privilege of jury service would give us an entree to many groups. Besides, it is a fact that the duty of the court is to administer justice according to the facts and not according to social welfare, just because life is frequently cruel and unfeeling.

Bearing in mind these considerations, SIIS formulated and produced a 15 minute color and sound film, "A Matter of Fact", on jury service. With the film, which you shall very shortly see, was a speech. SIIS now has several speeches on this subject, but in the pioneering days one given originally by Newton Gresham of Fulbright, Crooker, Freeman, Bates & Jaworski of Houston, served us very well. Also, an excellent paper prepared by Kirby Smith, assistant general counsel, Texas Employers' Insurance Association, Dallas, has given good results.

In actual practice, many of these speeches have been made by district, county and even federal judges . . . a great prestige factor that would not have been possible without the historic, public-service approach to the problem of obtaining judicious jurors. TV stations in Texas, at Beaumont, Austin, Dallas, Ft. Worth, Odessa, Midland and Waco have shown the jury service film. Often they have used a discussion panel of judges and attorneys. In San Antonio the film was run on a local TV program sponsored by the San Antonio Bar Association . . . this through the good services of Josh Groce of Eskridge, Groce and Hebdon.

In presenting this problem to the public, SIIS has stressed that the jury must first establish negligence and then predicate damages on expenses; loss of earnings (present and future) and, to the extent that it can be monetized, pain and suffering. SIIS has illustrated these points with actual cases.

A superior judge in Bangor, Maine, recently discharged a juror who attempted to learn whether or not insurance was involved in an automobile accident. Said the judge, "We are not here to distribute the wealth. We decide in this court who is right and who is wrong, rich or poor, and if we depart from that standard, we cease to be a court."

To date, SIIS has carried the jury service story to civic and women's clubs all over Texas. We have shown the film, and the groups have responded with discussion and interest and a new awakening to the problem.

However, as in any public relations program, results are seldom immediately and dramatically apparent. To be sure, at a recent convention, the National Association of Claimant's Compensation Attorneys spent a morning discussing ways of combating the efforts of SIIS. However, in an effort to establish some pattern of effect, SIIS is beginning a new type of operation. It is anxious to know if it can produce jurors who more clearly understand the purpose of a court of law. SIIS wants to know if it can bring you jurors who realize that the awarding of large sums of money without first establishing negligence jeopardizes their own security. We hope to enlighten prospective jurors to the effect that the awarding of large sums of money is reflected ultimately in insurance rates that are already getting beyond the financial reach of many.

The SIIS membership was asked to submit the names of counties where juries were giving the most trouble. From this list, the board of directors has chosen two Texas counties for an activity which is referred to as "Operation Saturation". In these two counties, SIIS will concentrate its effort, will address every civic, woman's and church group possible. Direct mail will be used to reach the list of property owners and the car registration lists.

The counties chosen are primarily rural and small town areas. The problem will be one of reaching a farm population and, for this, the rural press and farm magazines may be used in an advertising campaign. Wherever feasible, farm organizations will be shown the film.

Each time a speech is made, a press release summarizes the salient points, thus they are kept before the public in the news columns.

These particular counties present a problem. As you well know, a local law firm, well known and respected, carries great weight with local jurors. In many of the more rural areas, the local counsel retains the services of a more prominent damage suit firm. The defense counsel is then faced with a difficult combination of local prestige and experience, along with the big-city damage suit tactics. This, as each of you knows, is a rugged situation with which to be confronted.

Our hope then rests, as it so often has in this country, with the average man . . . that is, the voter, car owner and family man who will serve on your juries, hear your cases, and render a verdict. Can we educate him and then get him to serve conscientiously when called for jury duty? (Applause.)

CHAIRMAN EIDMAN: I want to thank Tom Wassell for bringing to our group the information which he has about what some of us in some parts of the country are trying to do about our mutual problems. Tom has just reminded me that SIIS has available numerous copies of this film and other films which they use and if anyone from any other part of the country wants to try one of them out sometime for size all you have to do is to get in touch with SIIS and they will be glad to furnish them for you.

Federal Tax Claims: The Contractor's Surety and Suppliers*

J. HARRY CROSS**
Baltimore, Maryland

INTRODUCTION

OUR setting lies in building and construction work. The circumstances are simple, but they produce problems of complexity. The contractor defaults. In one instance he has not furnished bond, and in the other instance he has. Where he has not furnished bond, he leaves unpaid suppliers of labor or material on the job. Where he has furnished bond, his surety sustains loss. The unpaid suppliers, and the surety, have various interests which can produce reimbursement. Finally, these interests encounter competition from

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**Vice-President and General Counsel, United States Fidelity and Guaranty Company; member of Fidelity and Surety Insurance Committee.

another unpaid party—the federal government with a claim for taxes. This competition requires analysis of the various interests—their nature and legal effect.

Congress has never said that a third party shall be liable, or that his property can be taken, for the federal taxes of another party, or that the government shall have an interest in the tax debtor's property greater than the tax debtor himself possesses. But we are warned that it is part of a mature system of law to make distinctions, provided the distinctions are not without differences.[1]

In the course of analyzing the various interests, we will see the emergence of two vital points, viz: (1) antecedent interests, and (2) no debt. Antecedent interests are those which already exist when the claim of the federal government for taxes arises, and the question is whether the antecedent interests are cut off by the subsequent tax claim. More colorfully stated, is there a time bomb in antecedent interests—set to explode when a federal tax claim subsequently arises? It will be seen that the order of time in which certain things happen is important. However, the order of time is irrelevant to the second point, no debt, which presents the question whether certain funds belong to the tax debtor, for if they do not, then he has no property in this respect, and no property in him necessarily means no property for the government's tax claim rights to attach to.

Interests of The Federal Government

A claim for taxes does not *ex proprio vigore* give any special remedy for collection.[3] Without the aid of statute, the tax creditor would be but a general creditor.[3]

The federal government is aided principally by three types of statutes: (1) the general tax lien statute, (2) the priority statute, and (3) the bankruptcy statute.

A. *Tax lien statute.* This statute, commonly known as section 3670,[4] dates from 1866,[5] and it has undergone amendments.[6] Since contemporaneous construction may shed valuable light upon statuatory meaning,[7] it will be noted that this is not available in the Supreme Court, for the first construction by that court did not occur until 26 years later, in 1892.[8]

The essence of that statute is that, for any unpaid tax, there is imposed a lien, in favor of the United States, upon all property and rights to property, whether real or personal, belonging to the tax debtor. The statute goes no farther, and furnishes no criteria, in regard to the crucial words "lien" and "property."

The broad outlines of the term "property" have been established as embracing tangible property, intangible property such as a debt,[9] and after-acquired property,[10] situated anywhere in the United States.[11] Since Congress has not set up a system of property law, and there is no federal general common law,[12] it must necessarily be that Congress intended all aspects of "property" to be determined in accordance with the only existing system of property law—state law. Some courts have expressly applied state law.[13] Thus, in an important case, decided this year, it was held that whether or not property

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[1] *Provident Trust Co.* v. *Metrop. Cas. Ins. Co.*, 152 F. 2d 875, 879-80 (3 Cir., 1945).

[2] 27 A & E 2d 735, 782; 61 C. J., Taxation, sections 1155, 1359; Peppin, Priority of Tax and Special Assessment Liens, 23 Calif. L. Rev. 264, 265-7 (1934).

[3] To escape this result, one court sought to work out a sovereign prerogative in the payment of federal taxes, notwithstanding the U.S. does not possess the common law prerogative of the sovereign to be first paid. *Liberty Mutual Ins. Co.* v. *Johnson Shipyards Corp.* 6 F. 2d 752 (2 Cir., 1925), affirmed on different ground in 269 U. S. 503, 46 S. Ct. 182, 70 L. Ed. 379.

[4] Now 26 USCA section 6321.

[5] 14 Stat. 107 (1866)

[6] *Detroit Bank* v. *U.S.*, 317 U.S. 239, 63 S. Ct. 297, 87 L. Ed. 239 (1943); concurring opinion Justice Jackson in *U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950).

[7] Sutherland, Statutory Construction, 3rd. Ed., section 5101.

[8] *U.S.* v. *Snyder*, 149 U.S. 210, 37 L. Ed. 705, 13 S. Ct. 846. The court said: "The single question thus presented for our consideration is whether the tax system of the United States is subject to the recording laws of the States." And the decision was, No. Although the decision was thus limited, at some later period of time the case was regarded as deciding also that a secret federal tax lien was good against a subsequent purchaser for value without notice of the lien. See *U.S.* v. *Gilbert Associates*, 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071 (1953) and *U.S.* v. *Curry*, 201 F. 371 (D.C., Md. 1912).

[9] *Citizens State Bk. of Barstow* v. *Vidal*, 114 F. 2d 380 (10 Cir., 1940). *U.S.* v. *Eiland*, 223 F. 2d 118 (4 Cir., 1955).

[10] *Glass City Bank* v. *U.S.*, 326 U.S. 265, 66 S. Ct. 108, 90 L. Ed. 56 (1945).

[11] See concurring opinion Justice Jackson, *U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950).

[12] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 67, 58 S. Ct. 817, 822, 82 L. Ed. 1188.

[13] *Metropolitan Life Ins. Co. v. U.S.*, 107 F. 2d 311 (6 Cir., 1939); *Jones* v. *Kemp*, 144 F. 2d 478 (10 Cir. 1944); *U.S.* v. *Winnett*, 165 F. 2d 149 (9 Cir., 1947).

exists, in the form of a contractual right, is a matter of state law only.[14] It appears to one court,[15] however, that the Supreme Court has looked both to, and also away from, state law, and that the better view is represented by the line of Supreme Court cases applying state law. Akin to applicable law is the problem of uniformity. In the *Gilbert Associates* case,[16] decided by the Supreme Court in 1953, the court sought the goal of uniformity, declaring that:

> "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be."

But it was previously determined by the same court that differences of state law may not be read into the Federal Revenue Act to spell out a lack of uniformity.[17] If uniformity is to be accomplished, in determining the meaning of property, it would seem necessary for Congress to provide a separate, complete, and continually up to date, system of property law, blanketing the nation. Until such time, the absence of federal general common law means that state law of property must be resorted to and applied in determining the meaning of property in the federal tax lien statute.

The term "lien" is the name given to a right, exercisable over the property of another. The right is usually defined as:

> "A hold or claim which one person has upon the property of another as a security for some debt or charge."[18]

This security-claim upon the property of another involves matters of effect and enforcement. These matters are governed by statute, in the case of a statutory lien, and into this category falls the federal tax lien. As to enforcement, the federal statutes provide for it by authorizing levy upon the property of the tax debtor, and levy is defined to include the power of distraint and seizure by any means, and the power to sell.[19] The effect of the lien will occupy considerable length in examining its competition with the interests of suppliers and the contractor's surety. A leading feature of the effect will be found to be the order of time in which certain events happen.

The federal tax lien being entirely statutory,[20] the rule is that the lien is not to be enlarged by construction.[21] Later on, we will see how this rule has fared in the Supreme Court.

The statute does not confer any superiority upon the federal tax lien.[22] On this account, the Supreme Court, in 1954,[23] thought that Congress, when it enacted section 3670, had in mind the cardinal rule, enunciated by Chief Justice Marshall in 1827,[24] that:

> "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, . . ."

This is the rule familiarly expressed "first in time, first in right."

The order of time rule makes it important to determine when the federal tax lien arises. There is some ambiguity in this respect. The section imposing the lien[25] does so "If any person liable to pay any tax neglects or refuses to pay the same after demand." This language indicates that demand and refusal to pay are conditions precedent to the lien arising. The next section[26] provides that, "Unless another date is specifically fixed by law, the lien shall arise at the time the assessment is made." Since demand is not made until after the assessment, the question has been raised as to whether the two provisions may be inconsistent. The court[27] which not decide the effect of it, and the point seems not to have been followed up. At any rate, the cases hold that demand is a condition precedent to the existence of a lien,[28] and, moreover, that the burden of

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[14] *Fidelity & Deposit Co.* v. *New York City Housing Authority*, 241 F. 2d 142 (2 Cir. 1957).

[15] *U.S.* v. *E. Regensburg & Sons*, 124 F. Supp. 687 (D.C., N.Y. 1954).

[16] 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071.

[17] *Poe* v. *Seaborn*, 282 U.S. 101, 51 S. Ct. 58, 75 L. Ed. 239 (1930).

[18] Bouvier's Law Dictionary, "Lien".

[19] 26 USCA section 6331.

[20] *McKenzie* v. *U.S.*, 109 F. 2d 540 (9 Cir., 1940); See also *U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950) saying that the lien "stems from" the statute.

[21] *Libby & McNeill* v. *City of Yakutat*, 206 F. 2d 612 (9 Cir., 1953). Although the cited case involved a non-federal statutory tax lien, the same rule would seem applicable to the federal tax lien within the doctrine of *Gould* v. *Gould*, 245 U.S. 151, 38 S. Ct. 53, 62 L. Ed. 211 (1917).

[22] *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178 (3 Cir., 1956).

[23] *U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

[24] *Rankin* v. *Scott*, 12 Wheat, 177, 6 L. Ed. 592.

[25] Section 3670, now 26 USCA section 6321.

[26] Section 3671, now 26 USCA section 6322.

[27] *McKenzie* v. *U.S.*, 109 F. 2d 540 (9 Cir., 1940). raised this question of inconsistency did

[28] *Cattani* v. *Korsan*, 103 Atl. 2d 51, affd. on another ground 108 Atl. 2d 110 (N.J. 1954); *U.S.* v. *Commonwealth*, 288 S.W. 2d 664 (Ky. 1956); *Detroit Bank* v. *U.S.*, 317 U.S. 329, 335, 63 S. Ct. 297, 300, 87 L. Ed. 239 (1943).

proving the demand rests on the Government.[29] Further, that a time difference in the assessment and demand has the effect of postponing the lien arising until both requirements have been satisfied.[30]

The time when the lien arises was made earlier in the 1954 code. There, the lien shall arise "at the time the assessment is made."[31] In contrast, in the preceding code of 1939[32] the lien shall arise "at the time the assessment list is received by the Collector." The significance of the change made by the 1954 code concerning the commencement of the lien is especially important to competing lienors who are not clearly within the protection of a mortgagee, pledgee, purchaser or judgment creditor under section 3672, because the lien seems to arise from a mere administrative assessment of a tax by an office whose records are not open to public scrutiny. It is truly a secret lien.[33] As to others than the tax debtor, it remains secret from "the time the assessment is made" until a local district collector removes the veil of secrecy by causing a notice of lien to be recorded. Under the 1954 code, as contrasted with the 1939 code, there necessarily will be a longer period of time during which many federal tax liens remain secret after the tax is assessed and prior to the time the first warning of their existence appears in the public records. That period of secrecy is of great importance to the attorney who must act and advise his clients with regard to property rights which are subject to federal tax liens which he cannot find out about but which may be a threat to his client under many different circumstances.

In addition to the matter of when the federal tax lien arises, we must also note the amendments of 1913 and 1939, constituting section 3672,[34] whereby as against any mortgagee, pledgee, purchaser or judgment creditor, the federal tax lien shall not be valid until notice thereof has been filed of public record. The 1939 amendment made further provision with respect to a security, as defined in the statute,[34a] whereby the federal tax lien shall not be valid against any mortgagee, pledgee or purchaser for value, without notice or knowledge of the tax lien, regardless of the filing of notice of lien. These amendments, known as the notice-filing provision, operate to defeat the precedence of the tax lien resulting from the order of time, as more fully discussed hereinafter.

Since the statute, as has been seen, does not confer any superiority upon the federal tax lien, a fair and reasonable construction would, in general, end the question of superiority between competing liens by the rule that, lien for lien, the first is superior.[35] Thus, the statute would not interfere with or override antecedent interests in the same property which later becomes subject to a federal tax lien. A person can create a lien on property only to the extent of his interest in it;[36] no greater right should be created by a federal tax lien which is not given primacy[37] by Congress. This is the prevailing view with respect to state tax liens;[38] it was the view prior to 1950 with respect to federal tax liens;[39] it accords with the construction of

[29] *Cattani* v. *Korsan*, 103 Atl. 2d 51. (N.J. 1954).

[30] *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178 (3 Cir., 1956); *U.S.* v. *Eiland*, 223 F. 2d 118 (4 Cir., 1955); *Detroit Bank* v. *U.S.*, 317 U.S. 329, 335, 63 S. Ct. 297, 300, 87 L. Ed. 239 (1943).

[31] 26 USCA section 6322.

[32] Section 3671

[33] See 26 USCA sections 6103 and 7213; *Grand Prairie State Bank* v. *U.S.*, 206 F. 2d 217 (5 Cir., 1953) holding that federal tax lien recorded at taxpayer's domicile is effective as to personal property located elsewhere.

[34] Now 26 USCA 6323.

[34a] 26 USCA 6323 which gives this statutory definition: "the term 'security' means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money".

[35] This nearly became the law, recently. In *U.S.* v. *Gilbert Associates*, 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071 (1953), the original opinion pronounced the rule that "Without more, priority would depend upon the dates the liens arose". Later, this statement was deleted by authority of the court. See *U.S.* v. *Albert Holman Lumber Co.*, 208 F. 2d 113 (5 Cir., 1953).

[36] Jones on Liens, section 9.

[37] One of the many examples of primacy is the N.Y. statute providing "such liens shall be paramount to all prior liens or encumbrances of any character", upheld in *International Harvester Credit Corp.* v. *Goodrich*, 350 U.S. 537, 76 S. Ct. 621, 100 L. Ed. 681 (1956) the statute being set forth below in 132 N.Y.S. 2d 511.

[38] Peppin, supra, note 2, 23 Calif. L. Rev. 264, 268-76; *Fresno County* v. *Commodity Credit Corp.*, (9 Cir., 1940).

[39] See the reference to thirty cases in Kennedy, the Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L. Journal 905, 924-5. (1954); a good illustration is *U.S.* v. *Sampsell*, 153 F. 2d 731 (9 Cir., 1946).

the federal priority statute by the Supreme Court prior to 1929.[40]

From 1950, the question of superiority has not been limited to the first in time rule, alone. The Supreme Court has annexed one qualification to that rule; and the government contends for another qualification.

The qualification annexed by the Supreme Court is the matter of "choateness." For a number of years the government argued before various courts to the effect that federal tax liens are analogous to the priority rights established by the later Supreme Court decisions under the federal priority statute.[41] This argument was adopted by the Supreme Court, in 1950, in the *Security Trust* case.[42] The result was to annex to competing state statutory liens, which are prior in time, the qualification that they must be "choate"[43] at the time the federal tax lien arises in order to be superior to the latter. The Supreme Court went one step farther in the *Security Trust* case; again borrowing from the later decisions under the priority statute, the court reinforced the annexed doctrine of choateness by making its application a federal question, thereby enabling the Supreme Court to re-examine other courts' decisions and to render final decision. It is of interest to note that, under the priority statute, after this choate requirement originated in the *Spokane County* case in 1929,[44] the Supreme Court has not yet found a competing state statutory lien to be choate at the requisite time. And under the feedral tax lien statute, the Supreme Court has found but one instance[45] of a competing state statutory lien being choate at the requisite time. Incidentally, the qualification of choateness is not applicable to the federal tax lien.[46] Without venturing into the limited explanations as to what may constitute choateness and their curious applications,[47] it may be noted that one court[48] considered that, with respect to choateness under the tax lien statute, the standard of perfection is not quite so unattainable as it has proven under the priority statute.

The government contends for another qualification, springing from the notice-filing provision of the 1913 and 1939 amendments, mentioned above.[49] The government seeks to have the courts read this notice-filing provision as having the effect of subordinating, to the federal tax lien, every kind of interest not specifically protected, regardless of the time of its attachment to the tax debtor's property.[50] In the *Security Trust* case,[51] Mr. Justice Jackson, in a concurring opinion, gave support to this argument, saying:

> "My conclusion from this history is that the statute excludes from the provisions of this secret lien those types of interest which it specifically included in the statute and no others."

This concept of "and no others" was uttered in a setting where the federal tax lien would seem to have been the subsequent lien, and so viewed its application presents difficulty. The concept has been recognized by a unanimous court in two cases,[52]

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[40]Kennedy, supra, note 39, p. 911.

[41]See Board of Sup'rs of *La. State Univ.* v. *Hart*, 26 So. 2d 361, 363 (La. 1946); Kennedy, supra, note 39, p. 922-3.

[42]*U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53. In explaining the analogy and its adoption, all that the court said was: "In cases involving a kindred matter, i.e., the federal priority under Rev. Stat. Section 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *People of State of Illinois, ex rel Gordon* v. *Campbell, supra*, 329 U.S. 374, 67 S. Ct. 347. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment lien of Morrison, and the judgment of the District Court of Appeal for the Fourth Appellate District is reversed."

[43]This rare term is amusingly discussed in 42 American Bar Assn. Journal (July, 1956), p. 608. It does not appear in all unabridged dictionaries. Webster's 1934 edition says: "Complete. Rare".

[44]Kennedy, supra, note 39, p. 911.

[45]*U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954) (involving city real estate taxes and water rent).

[46]*U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950); *U.S.* v. *City of Greenville*, 118 F. 2d 963 (4 Cir., 1941).

[47]*U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954); *Illinois* v. *Campbell*, 329 U.S. 362, 67 S. Ct. 340, 91 L. Ed. 348 (1946); Kennedy, supra, note 39.

[48]*Kel Weatherstrip Co.* v. *Rankin*, 124 F. Supp. 555, 560 (D.C., Alaska, 1954); See also *Kennedy*, supra, note 39, p. 929.

[49]Supra, note 34.

[50]Kennedy, supra, note 39, p. 921, note 99.

[51]*U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950).

[52]*U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954); *U.S.* v. *Scovil*, 348 U.S. 218, 75 S. Ct. 244 (1955), the broad statement in this case must be read in the context of the fact that the federal tax lien was the antecedent lien.

where its application presented no difficulty in the particular setting of the federal tax lien being the antecedent lien[52] and therefore first in time. Thus, in one, the *New Britain* case,[54] the court said:

> "There is nothing in the language of Section 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends supports to this impression."

The court's position was clearly limited to the effect of an antecedent federal tax lien and, therefore, does not bear on the reverse—a subsequent federal tax lien.

The United States Supreme Court has not decided the effect of Mr. Justice Jackson's concept, in the setting of a federal tax lien which is subsequent and not antecedent. It is submitted that the concept is not applicable to this setting, and specifically that a subsequent federal tax lien is ranked by all[55] antecedent interests. In the first place, when Justice Jackson expressed his concept, he did not have the benefit of two important points, because they were subsequently decided by the Supreme Court. These points, announced in the *New Britain* case[56] decided in 1954, are: (1) Congress conferred no superiority upon the federal tax lien, and (2) Congress, when it enacted the federal tax lien statute, had in mind the cardinal rule, first in time, first in right. These two qualifications upon the federal tax lien clearly do not affect, but actually protect, antecedent interests. In the second place, when Congress enacted the amendments of 1913 and 1939, the evil it was seeking to remedy consisted of two decisions,[57] in both of which the federal tax lien was the antecedent interest. In subordinating the subsequent interest to the antecedent federal tax lien, these decisions, it should be noted, accorded with the first in time rule. This history, therefore, did not deal with a subsequent federal tax lien. In the third place, the remedy that Congress applied did not deal with a subsequent federal tax lien. The amendments of 1913 and 1939 did not affect the arising of the tax lien—Congress l e f t the arising undisturbed. What Congress did was to say that, even when a tax lien arises, it nevertheless "shall not be valid" until notice thereof has been filed of public record, as to the specified types of interests, and an even longer period of "shall not be valid" can be applicable in the instance of a security as defined in the statute. This type of notice-filing protection does not operate retrospectively[58]—it does not act as a notice backward in time.[59] These three considerations disclose no purpose to affect or displace the interests of others existing antecedent to the arising of a federal tax lien. This area was simply not involved; only the reverse area was involved. In this light, the true effect of the notice-filing protection is, not the concept of "and no others," but it is to defeat the precedence of a federal tax lien resulting from the order of time, when any of the types of interests specified in the amendments arise in the periods that Congress has allowed;[60] for our present purpose, the period between the time the tax lien a r i s e s and the t i m e it is filed of public record. When those interests arise other than in that period, or whenever any other interests arise, the first in time rule governs as a general rule.

In the practical area, the Government's contention is refuted by Chief Justice Marshall in the *Hooe* case,[60a] decided by the Supreme Court in 1805. He pointed out that if the government's priority statute claim existed from the time the debt was contracted, and the debtor continued to transact business with the world, the inconvenience of that priority would certainly be very great. The chief justice was shocked at the inconvenience that would operate in the future. How much more shock where the inconvenience would operate not only forward but also backward! The consideration of inconvenience puts far in front the immensity of inconvenience

[52]Difficulty arises in the situation discussed in text at notes 149-156.

[54]*U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954).

[55]Save the future position of the Supreme Court on the annexed qualification of "choateness" as to non-federal liens.

[56]*U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

[57]*U.S.* v. *Snyder*, 149 U.S. 210, 37 L. Ed. 705, 13 S. Ct. 846 (1893); *U.S.* v. *Rosenfield*, 26 F. Supp. 433 (D.C., Mich. 1938); see also *U.S.* v. *Gilbert Associates*, 345 U.S. 361, 363, 73 S. Ct. 701, 97 L. Ed. 1071 (1953).

[58]*U.S.* v. *Peoples Bank*, 197 F. 2d 898, 899 (5 Cir., 1952); *U.S. v. Sampsell*, 153 F. 2d 731, 735-6 (9 Cir., 1946); *Gower* v. *State Tax Com.*, 295 P. 2d 162 (Ore. 1956).

[59]Pomeroy, Equity Jurisprudence, section 657.

[60]See Huck, Priority of a Subsequent Federal Tax Lien over an Antecedent Inchoate Lien, 54 Mich. Law Review 829, 839 (1956).

[60a]*U.S.* v. *Hooe*, 7 U.S. 93, 90, 2 L. Ed. 370, 375.

to the business world that would result from a subsequent federal tax lien reaching backward and destroying antecedent interests. To produce this dimension of havoc, Congress would have to put a time bomb into antecedent interests — to explode when a federal tax lien subsequently arises. Such congressional time bomb neither exists, nor would be expected to exist, in the federal tax lien statutes.

B. *Priority statute.* Turning to the second statutory aid of the federal government in the collection of taxes, it is the priority statute, commonly known as section 3466,[61] which dates from 1790,[62] was broadened in 1797, and since then has not undergone significant amendment.[63] Its essence is that, in certain cases of insolvency, the debts due to the United States shall be first satisfied. Contemporaneous construction, as shedding valuable light upon statutory meaning,[64] does exist under section 3466.

In the *Fisher* case, decided by the Supreme Court in 1804,[65] the principle was settled that the United States is entitled to secure to itself the exclusive privilege of being preferred as creditor to private citizens, and even to the state authorities, in all cases of the insolvency or bankruptcy of the debtor. But Chief Justice Marshall observed that:

> "On this subject it is to be remarked, that no lien is created by this law. No bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living; though it takes effect generally if he be dead."

Our discussion a little later will make relevent the fact that, on oral argument in the *Fisher* case, Mr. Justice Paterson asked counsel whether he contended that the priority of the United States "will avoid even a mortgage to an individual?"[66] What Chief Justice Marshall said for the court, quoted above, can properly be read against the background of Mr. Justice Paterson's question. In the *Hooe* case,[67] decided by the Supreme Court in 1805, Chief Justice Marshall emphasized the no-lien aspect, saying:

> "In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected."

The term "debts" in the priority statute was finally settled by the Supreme Court in 1926[68] to include taxes. Also, the word "person" was early held to include a corporation.[69]

It is sometimes stated that, with reference to federal taxes, the priority statute applies where the tax debtor is insolvent. This is true in part only, for not every insolvency is within the statute.

"Insolvency" within the statute must be of a particular kind and manifested in a particular way. With reference to the *kind* of insolvency, the statute makes it apply only in cases where the debtor "not having sufficient property to pay all his debts . . ." This has always been construed not to apply to mere inability of the debtor to pay all his debts in the ordinary course of business. Thus, where pursuant to state law a bank was found to be insolvent and unable to pay its debts and to continue as a going concern, and was taken over by the bank commissioner, but such insolvency under the state law was not necessarily with reference to insufficiency of assets, the priority statute was held not to apply.[70] With reference to the *manifestation* of insolvency, it must be in one of the modes pointed out in the statute,[71] viz: (1) voluntary assignment by the insolvent of all[72]

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[61] Now 31 U.S.C.A. section 191.

[62] This first enactment on the subject was limited to "bonds" for the payment of revenue duties. Further legislative history through 1799 is recited in Anno. 29 L.R.A. 226, 227.

[63] *Price* v. *U.S.*, 269 U.S. 492, 46 S. Ct. 180, 70 L. Ed. 373 (1926).

[64] Sutherland, Statutory Construction, 3rd Ed., section 5101.

[65] *U.S.* v. *Fisher*, 6 U.S. 358, 390, 2 L. Ed. 304, 315.

[66] 6 U.S. 358, 379, 2 L. Ed. 304, 311.

[67] *U.S.* v. *Hoe*, 7 U.S. 73, 90, 2 L. Ed. 370, 375.

[68] *Price* v. *U.S.* 269 U.S. 492, 46 S. Ct. 180, 70 L. Ed. 373 (1926).

[69] *Beaston* v. *Farmers Bank of Del.*, 37 U.S. 102, 9 L. Ed. 1017 (1838).

[70] *U.S.* v. *Oklahoma*, 261 U.S. 253, 43 S. Ct. 295, 67 L. Ed. 638 (1923). See also *Maryland Casualty Co.* v. *U.S.*, 53 F. Supp. 436 (Ct. Claims, 1944); *Kohlman* v. *Alexander*, 150 N.Y.S. 2d 134 (App. Div. 1956); *U.S.* v. *Crosland Const. Co.*, 120 F. Supp. 792 (DC, SC 1954) and cases therein cited.

[71] *U.S.* v. *Oklahoma*, 261 U.S. 253, 43 S. Ct. 295, 67 L. Ed. 638 (1923).

[72] *U.S.* v. *Hooe*, 7 U.S. 73, 2 L. Ed. 370 (1805).

his property to pay his debts; or (2) in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law; or (3) in which an act of bankruptcy is committed; or (4) death of the insolvent. These modes, in view of their manifesting insolvency that is both actual and notorious, have been said to give to the world some reasonable and definite test by which to ascertain the existence of the latent and dangerous preference given by law to the United States.[73] The lack of both kind and manifestation of insolvency is illustrated by the *Hooe* case,[74] decided by the Supreme Court in 1805, where a collector of the revenue had mortgaged part of his property to his surety in his official bond, to indemnify him from his responsibility as surety, and to secure him from his existing and future endorsements for the mortgagor at bank; the mortgage was held valid against the priority claim of the United States on the grounds that: (1) as to the kind of insolvency, the government had failed to show insufficiency of assets although the collector was, in point-of-fact, unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew, when he took the mortgage, that the mortgagor was largely indebted to the United States; (2) as to the manifestation of insolvency, a voluntary assignment within the purview of the priority statute, must be of all, and not part, of the debtor's property, and hence a mortgage of part only of the debtor's property was not within the statute.

The burden of proof is upon the government to show the requisite insolvency, both kind and manifestation.[75]

In requiring that the debts due to the United States shall be first satisfied, the statute contemplates resort only to the debtor's estate, his general funds.[76] This would seem to mean that the debtor's estate is what is left after satisfying antecedent interests of others because, of course, the debtor's estate is that and that only. Even so, there has always been a question as to what antecedent interests of other parties in the debtor's estate may be cut off by the priority statute. For many years the priority statute was considered not to affect any lien, general or specific, existing when the event took place which gave the government a claim of priority.[77] An inchoate lien has fallen, however, it being held not enough to defeat the priority.[78] This concept of inchoateness has been applied by the Supreme Court since 1929, its launching being attributed to the *Spokane County* case decided in that year.[79] In regard to a specific lien, it was at one time stated that a specific perfected lien bars the priority of the United States,[80] but in more recent cases the Supreme Court has reserved the point.[81] In the area of a specific lien, a matter of great importance is the effect of the priority statute on previous mortgages. It was held for many years that such mortgages were not affected.[82] This repose for mortgages has, however, been seriously shaken in recent years, for the Supreme Court, commencing with the *Maclay* case,[83] decided in 1933, has raised the question whether the rule of the old mortgage cases is to be applied in jurisdictions where a mortgage upon real estate is a lien and nothing more.[84] Apparently the repose is undisturbed as to mortgages in title theory states. The cases raising the question as to mortgages in lien theory states also raise the question of the subordination of the priority claim to a specific and perfected lien. Although this latter question also remains unanswered by the Supreme Court, it was met head on

[73] 1 Kent Commentaries, *246.
[74] *U.S.* v. *Hooe*, 7 U.S. 73, 2 L. Ed. 370 (1805).
[75] *U.S.* v. *Hooe*, 7 U. S. 73, 2 L. Ed. 370 (1805).
[76] *Thelusson* v. *Smith*, 16 U.S. 396, 424, 4 L. Ed. 271, 278 (1817); *U.S.* v. *Hack*, 33 U.S. 271, 8 L. Ed. 941 (1834).
[77] *Brent* v. *Bank of Wash.*, 35 U.S. 596, 611-12, 9 L. Ed. 547, 553 (1836).
[78] *U.S.* v. *Knott*, 298 U.S. 544, 56 S. Ct. 902, 80 L. Ed. 1321 (1936).
[79] *Spokane County* v. *U.S.*, 279 U.S. 80, 49 S. Ct. 321; Kennedy, supra, note 39, p. 911.
[80] *U.S.* v. *Knott*, 298 U.S. 544, 551, 56 S. Ct. 902, 905, 80 L. Ed. 1321.
[81] *U.S. v. State of Texas*, 314 U.S. 480, 62 S. Ct. 350, 86 L. Ed. 356 (1941); *U.S.* v. *Gilbert Associates*, 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071 (1953).
[82] *Savings and Loan Society* v. *Multnomah County*, 169 U.S. 421, 428, 42 L. Ed. 803, 805 (1898); *U.S.* v. *Guaranty Trust Co.*, 33 F. 2d 533, 536-7 (8 Cir., 1929).
[83] *People of the State of N.Y.* v. *Maclay*, 288 U.S. 290, 294, 53 S. Ct. 323, 324, 77 L. Ed. 754; *U.S.* v. *State of Texas*, 314 U.S. 480, 62 S. Ct. 350, 86 L. Ed. 536 (1941)
[84] Earlier, any distinction between the lien and title theories was clearly disregarded. *Savings and Loan Society* v. *Multnomah County*, 169 U.S. 421, 42 L. Ed. 803, 18 S. Ct. 392 (1898). For a classification of the lien and title theory states, see Tiffany, Real Property 3rd Ed. section 1380. In a lien theory state (Cal.), the Government disclaimed any priority of its tax lien over the previously executed mortgages involved in *U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950).

and decided against the government in 1954, by the Fifth Circuit Court of Appeals,[85] which said:

> ". . . This statute applies only as against unsecured debts, that is, debts not secured by a specific and perfected lien. It has never been, we think it will never be, applied as it is sought to be applied here, to accord payment to a debt due the United States in preference to a claim secured by a lien which is prior in time and superior in law to the lien of the United States securing the debt for which preferential payment is sought."

Finally, it is to be noted that a priority statute claim does not defeat an antecedent assignment of a chose in action, as collateral security.[86]

C. *Bankruptcy statute.* This is the third statutory aid of the federal government in the collection of taxes. Here we encounter a remarkable contrast in the matter of the will of Congress. Under the tax lien and priority statutes, where Congress expressed its will in only the most general and abbreviated form, we saw that the Supreme Court, in interpreting that will of Congress, broadened, step by step, the authority of the federal government to collect unpaid taxes and debts. In contrast, under the bankruptcy statute, where Congress expressed its will specifically and in detail, we find policies that look in the opposite direction from those attributed to Congress by the Supreme Court under the tax lien and priority statutes. Thus, federal taxes are relegated to the fourth of a five-rung ladder of priority;[87] the section 3466 priority is relegated to the fifth rung;[88] and inchoate liens, which include statutory mechanics' liens, are dealt with by Congress[89] much more solicitously than by the Supreme Court. Granting that the courts must carry out the will of Congress "to secure an adequate revenue to sustain the public burdens,"[90] this purpose is nevertheless the primary business of Congress. And when Congress has clearly expressed its will, as in the bankruptcy statute, such clearly expressed will should govern the judicial construction of its less clearly expressed will in the tax lien and priority statutes, instead of the latter will being regarded as proceeding in a direction sharply at variance with the former will.[91] The will of Congress in the bankruptcy statute serves to emphasize the congent remark of one commentator that, without the aid of Congress, the Supreme Court built detour roads under the priority and tax lien statutes.[92]

Interests of Suppliers

A. *Mechanic's lien.* On private work, suppliers have a right to state statutory mechanics' lien. These statutes are generally of two classes, known as the "New York" and "Pennsylvania" systems.[93] The distinction between these two systems[94] is helpful to an understanding of the federal tax lien cases. Under the "New York" system, the supplier cannot claim a lien for a sum greater than that due to the contractor at such time as the supplier may give notice of his claim to the owner, who is thus enabled to withhold from the contractor sufficient to satisfy the claim of the supplier. Under the other system, sometimes termed the "Pennsylvania" system, the supplier is given a direct lien, which is not dependent on any indebtedness due to the contractor from the owner.

Under the "Pennsylvania" system, suppose the tax debtor is the owner of the real estate (and not the contractor). Thus, the owner's real estate is subject to two liens—one by the federal government by virtue of the federal tax lien statute, and the other by the supplier by virtue of the state mechanics' lien statute. What is the result of this competition?

Where the courts treated the mechanic's lien as attaching subsequent to the federal tax lien, they awarded superiority to that

[85] *U.S.* v. *Atlantic Municipal Corp.*, 212 F. 2d 709, 711.

[86] *Harrison* v. *Sterry*, 9 U.S. 289, 3 L. Ed. 104 (1809), were, in upholding the equitable assignment in this case, the court disregarded the argued distinction between an assignment of real estate (mortgage) and an assignment of only a chose in action. (p. 292 and 105); *Conard* v. *Atlantic Ins. Co. of N. Y.*, 26 U.S. 386, 7 L. Ed. 189 (1828); see also *Brent* v. *Bank of Washington*, 35 U.S. 596, 9 L. Ed. 547 (1836).

[87] 11 U.S.C.A. section 104.

[88] 11 U.S.C.A. section 104.

[89] 11 U.S.C.A. section 107 (b).

[90] *U.S.* v. *State Bank of North Carolina*, 31 U.S. 29, 35, 8 L. Ed. 308, 310 (1832).

[91] This view was at one time applied to the priority statute: *Emory* v. *St. James, Inc.*, 143 S.W. 2d 318 (Mo. App. 1940), reversed in *U.S.* v. *Emory*, 314 U.S. 423, 62 S. Ct. 317, 86 L. Ed. 315 (1941); See also Kennedy, supra, note 39, p. 930-2; *Guaranty Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152, 56 L. Ed. 706, 32 S. Ct. 457 (1912).

[92] Kennedy, supra, note 39, p. 929.

[93] Tiffany, Real Property, 3rd Ed., section 1576.

[94] 36 Am. Jur., Mechanics' Liens, section 6, p. 21.

antecedent tax lien.[95] Conversely, where the courts treated the mechanic's lien as attaching earlier than the federal tax lien, then, prior to October 10, 1955, they awarded superiority to that antecedent mechanic's lien.[96] In the latter situation, the courts applied the rule that a lien first in time is first in right, and also they recognized the powerful equity of avoiding the unjust enrichment which would occur from subordinating suppliers whose labor and materials had enhanced the value of the owner's property and whose bread and butter were at stake.

The date of October 10, 1955 marks an important event. On that date the United States Supreme Court spoke, or, more accurately, acted, on the subject, for the first time. The *Colotta* case[97] came up from Mississippi, whose supreme court, in a scholarly opinion, had upheld the superiority of a mechanic's lien over a federal tax lien. The state court construed the mechanics' lien statute of Mississippi to attach the lien to the owner's property at a time which, in this particular case, was earlier than the federal tax lien. The government petitioned for certiorari; the respondent did not oppose or file any brief, and the record was not printed.[98] On October 10, 1955, the United States Supreme Court handed down its opinion, which reads in full:[99]

> "PER CURIAM. The petition for writ of certiorari in this case is granted and the judgment is reversed."

Mr. Justice Douglas dissented, without opinion. On later motion to the Supreme Court of Mississippi to reverse and remand, that court said:[100]

> "Our interpretation of our own state statute, as to when a mechanic's or materialmen's lien arises, appears to have been given no weight by the Supreme Court of the United States, . . ."

The motion was sustained by the majority of the judges of the state court. Three dissented, and they pointed out that the reversal by the United States Supreme Court, without opinion, left them in the dark as to why the case was reversed and as to what was decided.

The darkness still persists, although six months later the United States Supreme Court acted again on the same subject. The *White Bear* case[101] involved the Illinois mechanics' lien statute. The Court of Appeals for the Seventh Circuit, being fully aware of the *Colotta* case, by divided vote granted superiority to an antecedent mechanic's lien where suit to enforce that lien was pending when the federal tax lien arose. The Government petitioned for certiorari, and on April 9, 1956, the United States Supreme Court handed down its opinion, which reads in full:[102]

> "PER CURIAM. The petition for writ of certiorari is granted and the judgment is reversed."

Justices Douglas and Harlan dissented, and they said:

> "The Court apparently holds that under 26 U.S.C. §3670, 26 U.S.C.A. §3670, a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment. That is new doctrine, not warranted by our decisions, and supportable only if the New Britain case were overruled."

Apparently, the dissenters view the majority as contemplating, not the "and no others" concept of Justice Jackson,[103] but a new and expanded concept of "choateness," whereby a judgment is required.[104] On May 28, 1956, the court entered an order denying a petition for rehearing.[105]

The Supreme Court's end result action on mechanics' liens of the "Pennsylvania" system is not completely accepted. It was not followed in the *Vorreiter* case,[106] decided February 15, 1957 by the Supreme Court of Colorado, awarding superiority to a mechanic's lien over a federal tax lien which was antecedently filed in another

[95] *Fleming* v. *Brownfield*, 290 P. 2d 993 (Wash. 1955); *U.S.* v. *Eisinger Mill & Lumber Co.*, 98 Atl. 2d 81 (Md. 1953); *Republic Natl. Life Insurance Co.* v. *Hedstrom*, 105 N.E. 2d 782 (Ill. App. 1952)

[96] *U.S.* v. *Colotta*, 79 So. 2d 474 (Miss. 1955); *U.S.* v. *Griffin-Moore Lumber Co.*, 62 So. 2d 589 (Fla. 1953); *U.S.* v. *Holman Lumber Co.*, 206 F. 2d 685, 208 F. 2d 113 (5 Cir., 1953).

[97] *U.S.* v. *Colotta*, 79 So. 2d 474.

[98] Revealed in *U.S.* v. *White Bear Brewing Co.*, 227 F. 2d 359, 364 (7 Cir., 1955).

[99] 350 U.S. 808, 76 S. Ct. 82, 100 L. Ed. 725.

[100] 86 So. 2d 19, 20.

[101] *U.S.* v. *White Bear Brewing Co.*, 227 F. 2d 359.

[102] 350 U.S. 1010, 76 S. Ct. 646, 100 L. Ed. 871.

[103] Text, supra, note 51.

[104] A judgment requirement was, a month earlier, so understood in *Gower* v. *State Tax Commission*, 295 P. 2d 162, 164 (Ore. 1956). It was considerably diluted by the court's restatement of the Government's argument in *U.S.* v. *Albert Holman Lumber Co.*, 206 F. 2d 685, 688 (5 Cir., 1953).

[105] 351 U.S. S. 958, 76 S. Ct. 845, 100 L. Ed. 1481.

[106] *U.S.* v. *Vorreiter*, 307 P. 2d 475.

state and subsequently filed in the state where the land was situated. The court considered that to agree with the government's position would mean pulling down the structure of property law of the state, which the court refused to do.[107]

Turning to the "New York" system of mechanic's lien, suppose the tax debtor is the contractor (and not the owner), which is the converse of what we supposed under the "Pennsylvania" system. Also, the property, instead of being the real estate, is the contract fund in the hands of the owner. Thus, the contract fund is subject to rival interests—one by the federal government by virtue of the federal tax lien statute, and the other by the supplier by virtue of the state mechanics' lien statute. What is the result of this competition?

There are two important decisions in New York, involving the mechanics' lien law of that state.

In the *Kings County* case,[108] decided in 1955, the Court of Appeals for the Second Circuit awarded superiority to a federal tax lien which had been filed 6 days before the mechanic's lien had been filed and where the supplier never sued to enforce the mechanic's lien. The court ruled on various points, but apparently the basic grounds were (1) that when the government's tax lien attached, the supplier had no more than an inchoate and general lien which, for federal purposes, was insufficient to defeat the tax lien, and (2) that the contract fund belonged to the contractor and, as such, was subject to federal levy.

A year later, the New York Appellate Division decided the *Acquilino* case.[109] There, the federal tax liens against the contractor arose before the construction contract was entered into, they were filed after the suppliers had furnished labor and material but before the suppliers had filed mechanics' lien notices; and the suppliers had commenced suit to enforce their mechanics' liens. The appellate division invoked a very important concept, viz: that there was *no debt* due from the owner to the contractor, to which the federal tax lien could attach. Among the reasons were: the contract funds were substituted for the owner's real estate and must be distributed in the same manner as if they were the proceeds realized on its sale, the government had no lien against the real estate, and, as to the substituted contract funds, the government was in no better position than the contractor, who would be entitled only to the balance after payment of the mechanics' liens. In short, the contractor was not entitled to the contract funds, ahead of the suppliers, and the government's tax lien right could rise no higher. The appellate division denied a later motion by the government for leave to appeal to the court of appeals.[110] Although the *Kings County* case was not cited by the appellate division, it is safe to believe that the government must have relied heavily on it.[111] The two decisions cannot be reconciled, and the later is the *Acquilino* case.

The no debt concept of the *Acquilino* case has been recognized and applied under the mechanics' lien laws of some other states.

In the *Ferber* case,[112] decided by the Supreme Court of New Jersey in 1954, the federal tax liens against the contractor were filed before the construction contract was entered into, and a levy upon the owner was made during the construction period and before the suppliers filed a stop notice with the owner pursuant to the New Jersey mechanics' lien law. In relation to the time the contract funds were payable by the owner, several suppliers filed their stop notices prior thereto, and one supplier filed his stop notice subsequent thereto. The court construed the effect of the stop notices as requiring the owner to withhold payments to the contractor until the stop notice claimant is satisfied up to the amount due, or to grow due, on the contract. This was held to result in the contractor's property right under his contract being "inchoate," and although the federal tax lien attaches to that inchoate right, it is not sufficient to enlarge[113] it for the lien of the government can rise no higher than the right of the contractor—tax debtor. The court applied this result

[107]Compare *Southern Ohio Savings Bank & Trust Co.* v. *Bolce*, 165 Ohio St., 201, 135 N.E. 2d 382, 390 (Ohio 1956).

[108]*U.S.* v. *Kings County Iron Works*, 224 F. 2d 232.

[109]*Acquilino* v. *U.S.*, 153 N.Y.S. 2d 268 (1956), opinion of lower court, 140 N.Y.S. 2d 355.

[110]154 N.Y.S. 2d 845.

[111]*Cf. Koehler* v. *Aljon Homes*, 155 N.Y.S. 2d 175 (1956).

[112]*Bankers Title & Abstract Co.* v. *Ferber Co.*, 105 Atl. 2d 408.

[113]In *U.S.* v. *Metropolitan Life Insurance Co.*, 130 F. 2d 149, 151 (2 Cir., 1942) it was said: "Yet certainly the section gives no evidence of any purpose to allow the United States to mend in the district court all infirmities of title in the taxpayer's property."

to the several stop notice claimants who had filed their stop notices prior to the time the contract funds were payable by the owner; and as to the supplier who filed his stop notice after that time, the court held that the contractor's property right in the balance of contract funds matured at that time, so the federal tax lien could and did attach to such funds, to the exclusion of the late stop notice claimant. All the judges concurred, including Justice Brennan, now an associate justice of the United States Supreme Court.

The Illinois statute was involved in the *Robertson* case,[114] decided by the appellate court of Illinois, in 1953. There, federal tax liens against the contractor were filed after the construction contract was entered into, and one tax lien for a large amount was filed before the bill of any supplier became due. The suppliers took some steps to obtain mechanics' liens under the Illinois statute. The government asserted priority on the ground that the mechanics' liens were inchoate when the federal tax liens attached. The court noted that if the government's contention is sustained there would be nothing left for the suppliers. Apparently recognizing possible inchoateness in the mechanics' liens, the court said that regardless of the question of priority and perfection of liens, a correct decision must be approached from a different point of view. It was then reasoned that the decisive question in the case is, what moneys were due to the bankrupt contractor under his contract, for the U. S. cannot claim more than the contractor was entitled to. One provision of the mechanics' lien law required the contractor to furnish the owner a list of subcontractors and the amount due or to become due to them. The contractor was found not to have compiled with this provision, and the effect is that payments without compliance with this provision are made by the owner at his peril. Another provision provided for retention of monies due subcontractors and for priorities of payment. Under this provision, the contractor is entitled to nothing unless and until all claims for wages and claims of subcontractors are paid in full. Inasmuch as the owner did not receive the list required by the first provision, and inasmuch as the lien claimants fully complied with the act in serving notices on the owner prior to his payment of funds, the contractor became entitled to none of these funds except the excess above what the owner was required to withhold for the payment of the subcontractor. Since that excess is all that the contractor could have been entitled to, the federal tax lien can rise no higher. Consequently, the suppliers were entitled to be paid out of the contract funds ahead of the government.

B. *Contract interests.* Apart from the effect of state mechanics' lien statutes, the unpaid supplier can be the occasion for, and the beneficiary of, the no debt concept arising under the construction contract between the contractor and the owner.

A good illustration is the *Scott* case,[115] decided by the Supreme Court of South Dakota in 1955. There, the federal tax liens against the contractor were filed after the construction contract was entered into, but before the supplier had filed a statement and notice of claim for mechanic's lien pursuant to state law. The pivotal matter was a clause in the construction contract whereby the owner reserved the right to withhold certain payments until the contractor, if required, shall deliver to the owner a complete release of all liens arising out of the contract.[116] Because this clause covered suppliers' liens, and such lien had been filed, the court held that the contractor had no property right in so much of the contract funds in the hands of the owner as was necessary for the payment of the claims of suppliers, who were therefore entitled to those funds.[117] A number of decisions, federal and state, were cited to the proposition that the rights of the United States do not extend beyond those of the taxpayer whose property is sought to be subjected to its liens. Also, the court distinguished the *Security Trust* case in the U. S. Supreme Court,[118] which the govern-

[114] *Robertson* v. *Huntley & Blazier Co.*, 115 N.E. 2d 533.

[115] *Scott* v. *Zion Evangelical Lutheran Church*, 70 N.W. 2d 326.

[116] This type of clause is widely used; and it is identical with that in the Standard Form of the American Institute of Architects, Art. 32 of the General Conditions of the Contract for the Construction of Buildings.

[117] Accord: *Transmix Concrete of Rockdale* v. *U.S.*, 142 F. Supp. 306 (DC, Texas 1956) which involved a clause similar to Art. 27 of the A.I.A. General Conditions, etc.; see also *Berkal* v. *M. DeMatteo Construction Co.*, 98 N.E. 2d 617, 621 (Mass. 1951).

[118] *U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950).

ment consistently relies upon for overriding those interests which stand in the way of collection under a federal tax lien. Pointing out the distinction, and cogently describing the decisive question, the court said:[119]

> "The cases cited by appellant are distinguishable. In United States v. Security Trust & Sav. Bank, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53, upon which appellant principally relies, the federal tax lien and an attachment under a state statute were applicable to the same property. The Government had in fact acquired a lien on the property of the taxpayer and the court was concerned with the question of the priority of liens. The question in the instant case is not one of priority and perfection of liens. The decisive question is what amount under the contract was due to Nemmers. The contractor had no property right in so much of the fund in the hands of the church as was necessary for the payment of claims of materialmen and the government cannot claim more than the tax debtor Nemmers was entitled to."

Finally, the no debt concept finds application in the general law of contracts.[120] Illustrative is the *Damato* case,[121] decided by the Superior Court of New Jersey, Appellate Division, in 1956. There the federal tax liens against the contractor were filed before the construction contract was entered into. The contractor apparently abandoned the work, and in any event the work left unfinished cost approximately $3800 in comparison with a total contract price of approximately $28,000. The court upheld the contention of the unpaid suppliers that the contractor had failed to substantially perform the construction contract and consequently had no right to the contract funds.[122] With the defaulting contractor having no right to the contract funds, and the tax lien of the government rising no higher than the right of the contractor, the money was awarded to the unpaid suppliers. While there was some aspect of mechanic's lien in the case, it was eliminated and the primary question stated, as follows:

> "The question of the legal efficacy of the liens of the subcontractors is of no moment if, as respondents contend, Leone had no right to any of the monies here involved. The primary question is —are there any monies due Leone?— rather than—to whom are the monies due, if not to Leone, under the contract?"

The foregoing cases involved competition with the federal tax lien, and there are but few cases involving suppliers in competition with the federal priority statute. In the famous *Conard* case,[123] decided by the U. S. Supreme Court in 1828, the court, obiter, mentioned some liens which were not cut out by the priority of the United States, and included the lien of an artisan[124] for work and services upon the specific thing where he has possession of that thing. This probably referred to a common law possessory lien, and, of course, in 1828 state mechanics' lien statutes were not common.[125] Further, in the *Guaranty Title* case,[125a] decided by the Supreme Court in 1912, a claim for labor was in competition with a claim under the priority statute, the debtor being in bankruptcy. The problem was that the Bankruptcy Act of 1898, unlike the Bankruptcy Act of 1867, omitted words expressly giving priority to debts due to the United States. In other words, Section 3466 was affirmed in the earlier bankruptcy act, whereas it

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[119] Accord: *Fidelity & Deposit* v. *N.Y. City Housing Authority*, 241 F. 2d 142 (2 Cir., 1957); *Colusa-Glenn Production Assn.* v. *Phoenix Ins. Co.*, 145 F. Supp. 844 (D.C., Cal. 1956) and authorities therein cited.

[120] "According to the better view, in the case of an entire executory contract, which the plaintiff without legal excuse has failed to fulfill on his part, he can recover nothing, either on the contract itself or on a quantum meruit." Sedgwick on Damages (1912) section 659; see also the life insurance policy cases where there was no debt because the insurer's contractual liability had not accrued: *U.S.* v. *Massachusetts Mutual Life Ins. Co.*, 127 F. 2d 880 (1 Cir., 1942); *U.S.* v. *Penn Mutual Life Ins. Co.*, 130 F. 2d 495 (3 Cir., 1942); *U.S.* v. *Metrop. Life Ins. Co.*, 130 F. 2d 149 (2 Cir. 1942).

[121] *Damato* v. *Leone Construction Co.*, 125 Atl. 2d 302.

[122] Accord: *Colussa-Glenn Production Credit Assn.* v. *Phoenix Ins. Co.*, 145 F. Supp. 844 (DC, Cal., 1956); *Vincent* v. *P. R. Matthews Co.*, 126 F. Supp. 102 (DC, N.Y. 1954). Accord also, where the work was completed but some suppliers were unpaid: *USF&G Co.* v. *Miller*, 143 F. Supp. 941 (DC, NC, 1956); *Steelcraft Mfg. Co.* v. *Hewkin*, 148 F. Supp. 872 (D.C., Ill. 1956).

[123] *Conard* v. *Atlantic Ins. Co. of N.Y.*, 26 U.S. 386, 7 L. Ed. 189 (1828).

[124] As to this lien being akin to a mechanic's lien, compare 36 Am. Jur. p. 20 section 4 with Phillips on Mechanics' Liens, section 10.

[125] See Phillips on Mechanics' Liens, section 7.

[125a] *Guaranty Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152, 56 L. Ed. 706, 32 S. Ct. 457 (1912).

was not expressly affirmed in the later bankruptcy act. The court regarded the change in provision as producing a change of purpose which was to declare a different policy and give priority to labor claims. This policy the Supreme Court regarded in a most realistic light as between laborers and the United States, the court saying:

> ". . . The policy which dictated it was beneficient and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

This realistic light, needless to say, is not reflected in the Supreme Court decisions involving mechanics' liens of the "Pennsylvania" system in competition with the federal tax lien.

The no debt concept has been recognized and applied under the federal priority statute. Thus, in the *Hack* case,[126] decided by the Supreme Court in 1834, the government recovered judgments against a man on his custom-house bonds; that man was also a member of a partnership whose members executed a deed of trust for the benefit of partnership creditors, the members having no separate property; the partnership property was insufficient to pay partnership creditors; relying on the priority statute, the government claimed to be entitled to be first paid, to the extent of the judgment debtor's share of the partnership estate, in preference to partnership creditors. Reiterating previous decisions that, under the priority statute, the debt of the United States is not a lien but only entitled to priority of payment out of the general funds of the debtor, the court asked, what are the funds out of which this priority is set up in the present case? The court answered, that they are not the funds of the judgment debtor but of the partnership, and that the settled rule is that the interest of each partner in the partnership property is his share in the surplus after the partnership debts are paid, and that surplus only is liable for the separate debts of such partner. Since there was no surplus to which the separate partners were entitled, there was consequently no property of the judgment debtor-partner to which the priority of the United States could apply.

This rule of the *Hack* case was applied to the federal tax lien statute in the *Kaufman* case,[127] decided by the Supreme Court in 1925.

Interests of the Contractor's Surety

The surety has the right of subrogation and also direct contract rights.

A. *Subrogation.* It is universally recognized that the surety, upon paying the creditor, is entitled to be substituted to the creditor's position.[128] This right is known as the right of subrogation. The doctrine is confirmed by statute in a number of states, and is widely applied to sureties.[129] It is among the oldest of equitable doctrines, and it is said to be as much in the nature of a security as is a mortgage.[130] Instanter, upon payment, the surety steps into the creditor's shoes.[131] The doctrine contemplates full substitution.[132]

Pursuant to the doctrine of subrogation, the surety is entitled to all rights, remedies and securities available to the creditor. Accordingly, the contractor's surety has all the rights which suppliers[133] or the owner,[134] might have asserted against the contract funds, and some of those rights were discussed above.

The leading case is the *Prairie* case,[135] decided by the Supreme Court in 1896. There, the contractor defaulted in the performance of the construction contract, and the surety assumed the completion. The fund in controversy was the retained percentage, which the construction contract required to be retained until completion and acceptance of the entire work. The surety's competitor for this fund was a bank which had loaned money to the con-

[126] *U.S.* v. *Hack*, 33 U.S. 271, 8 L. Ed. 941 (1834).

[127] *U.S.* v. *Kaufman*, 267 U.S. 408, 45 S. Ct. 322, 69 L. Ed. 685.

[128] *Arant on Suretyship*, p. 357-8; *Simpson on Suretyship*, p. 206; *Restatement, Security*, sec. 141.

[129] 60 C.J., Subrogation, section 49.

[130] *American Surety Co.* v. *Bethlehem Natl. Bank*, 314 U.S. 314, 62 S. Ct. 226, 86 L. Ed. 241 (1941).

[131] *Putnam* v. *Comr. of Internal Revenue*, 352 U.S. 82, 77 S. Ct. 175, 176, 1 L. Ed. 2d 144 (1956).

[132] *United States Fidelity & Guaranty Co.* v. *Borough Bank*, 146 N.Y.S. 870, affd. without opinion 107 N.E. 1086 (N.Y. 1914). See valuable discussion of Vanderbilt, C.J., in *Standard Acc. Ins. Co.* v. *Pelleechia*, 164 Atl. 2d 288 (N.J. 1954).

[133] *Henningsen* v. *U.S.F.&G. Co.*, 208 U.S. 404, 52 L. Ed. 547, 28 S. Ct. 389 (1908), the leading case; anno. 76 A.L.R. 917.

[134] *Prairie State Bank* v. *U.S.*, 164 U.S. 227, 41 L. Ed. 412, 17 S. Ct. 142 (1896), the leading case; anno. 134 A.L.R. 738.

[135] 164 U.S. 227, 41 L. Ed. 412, 17 S. Ct. 142.

tractor, the bank holding an order or power of attorney from the contractor authorizing it to receive from the United States the final payment under the contract. The bank denominated both its interest and the surety's as a lien,[136] and argued that its lien antedated the surety's lien because the latter lien, it was contended, only arose from the date of the surety's advances made to complete the contract upon the contractor's default. The court awarded the fund to the surety, pointing out that the retained percentage[137] was a contract right which the owner might have asserted against the fund, to which right the surety, by subrogation, was clearly entitled; and the bank's lien, being derived from the contractor and dependent on the results of the construction contract with the United States, was subordinate to the contract right of the owner and therefore subordinate also to the surety who occupied the shoes of the owner. This contract right, of course, existed at the time the construction contract was made,[138] and it was on this account that the right was regarded as arising from, and in turn relating back to, the date of the construction contract.

The *Prairie* case also demonstrates the no debt concept as between the owner and the defaulting contractor, as discussed above starting with the *Acquilino* case. In the course of pointing out the confusion which had risen by treating the surety as subrogated merely to the rights of the contractor, the Supreme Court said this, in effect, was saying that the surety was subrogated to no rights whatever, because the defaulting contractor's right to the fund was subordinate to the contract right of the owner to apply the fund in reduction of damages resulting from the default. This no debt concept has been tersely described by one court in terms of the defaulting contractor's right against contract funds being "generally bootless."[139]

B. *Contract rights.*

1. *Under the construction contract.* Apart from the doctrine of subrogation, some courts regard the *Prairie* case as also holding that the surety acquires a contractual right, measured by the terms of the construction contract, between the owner and the contractor, which entitles the surety to the benefit of such provisions as inure to the protection of the owner.[140]

2. *Assignment.* In the contractor's application to the surety for bond, it is customary for the contractor to assign to the surety, as collateral, all contract funds. This assignment, of course, has nothing to operate on where there is no debt owing under the construction contract by the owner to the contractor.[141] There can be situations, however, where the no debt concept is inapplicable. One such situation is the *Ball* case,[142] decided by the Fifth Circuit Court of Appeals in December 1956. There, the surety bonded two jobs for the same contractor. Under the first bond the surety suffered no loss, the retained percentage became due and owing by the owner, and the contractor in applying for that bond had assigned the contract funds not only for losses growing out of that bond but also for the "payment of any other indebtedness or liability" of the contractor to the surety, "whether hereto-

[136]There has long persisted a loose and general sense in which the term "lien" is used. See *Conard* v. *Atlantic Ins. Co. of N.Y.*, 26 U.S. 386, 441, 7 L. Ed. 189, 213, (1828). Such use crops up in suretyship, *Danais* v. *M. DeMatteo Const. Co.*, 102 F. Supp. 874, 877 (DC, N.H. 1952), but that the surety's right is more than an equitable lien, and is an equitable property, is confirmed by comparing Pomeroy Equity Jurisprudence, note 18 to section 1280, with the fact that the cases award possession of the money to the surety. In the *Prairie Case*, supra, the surety's subrogation was to a contract right.

[137]This fund was spoken of by one court "just as though the contractor had pledged so many Liberty Bonds." *Town of River Junction* v. *Md. Cas. Co.*, 110 F. 2d 278, 281 (5 Cir., 1940), cert. denied 310 U.S. 634, 60 S. Ct. 1077, 84 L. Ed. 1403. The cited case distinguished between retained percentage and progress payments. Most courts make no such distinction and hold that the rights of the surety extend beyond the retained percentage and include all earned and unpaid contract funds. *Standard Accident Ins. Co.* v. *Federal Natl. Bank*, 112 F. 2d 692, 693-4 (10 Cir., 1940); *Scarsdale Natl. Bk. Trust Co.* v. *U.S.F.&G. Co.*, 190 N.E. 330 (N.Y. 1934).

[138]*Standard Accident Ins. Co.* v. *Federal Natl. Bank*, 112 F. 2d 692, 695 (10 Cir., 1940); *Steelcraft Mfg. Co.* v. *Hewkin*, 148 F. Supp. 872 (D.C., Ill. 1956).

[139]*Moran* v. *Guardian Cas. Co.*, 76 F. 2d 438 (App. D.C. 1935).

[140]*Pratt Lbr. Co.* v. *T. H. Gill Co.*, 278 F. 783, 798 (DC, N.C. 1922); See also, Judge Sibley's dissenting opinion in *American Surety Co.* v. *Westinghouse Elec. & Mfg. Co.*, 75 F. 2d 377 (5 Cir., 1935), affirmed 296 U.S. 60, 56 S. Ct. 9, 80 L. Ed. 44.

[141]Compare *Exchange State Bank* v. *Federal Surety Co.*, 28 F. 2d 485 (8 Cir., 1928).

[142]*U.S.* v. *R. F. Ball Const. Co.*, 239 F. 2d 384 (5 Cir.), affirming on opinion below in 140 F. Supp. 60. The government's petition for certiorari was granted in May, 1957.

fore or hereafter incurred."[144] The contractor incurred such other indebtedness to the surety by reason of the fact that under the second bond the surety sustained loss. The federal tax liens against the contractor were filed subsequent to the date of both bonds, and subsequent to the time the retained percentage became due and owing by the owner in connection with the first job, but prior to the time the surety sustained loss on the second bond. The surety contended that, since the assignment as collateral security was based upon a contract which was prior in time to the government's tax lien, the surety is within the notice-filing protection of section 3672 of the federal tax lien statute, as either a mortgagee, pledgee or purchaser of the retained percentage money. The court held, that the assignee surety might be a "purchaser" or a "pledgee," but that the surety, in this instance, more nearly comes within the classification of a "mortgagee" under the Texas law.

Where the assignment of a chose in action, as collateral security, antedates a claim of the government under either the tax lien statute or the priority statute, the courts have shown no hesitation to protect the assignment; and sometimes the government does not dispute.[144] Under the priority statute, the Supreme Court has protected such assignment in two cases,[145] one of which is the famous *Conard* case, decided in 1828. Under the tax lien statute, the courts have reached the same result, although on various grounds. Thus, the *Ball* case applied a line of decisions which accord the assignment one of the interests specifically protected by the notice-filing provision of the federal tax lien statute. Other cases[146] apply the no debt concept as between the assignor and the original debtor, apparently on the ground that, after assignment, there is no interest left in the assignor.[147] Doubtless the courts have been influenced by the traditional attitude toward protecting assignments of choses in action, expressed long ago by Blackstone, who said:[148]

> ". . . and our courts of equity, considering that in a commercial country all personal property must necessarily lie in contract, will protect an assignment of a chose in action, as much as the law will that of a chose in possession."

Cases where the federal tax lien is filed antecedent to the assignment, are clearly distinguishable[149] for they are an application of the first in time rule. Even in this area, however, the *Ball* case provides a distinction. The assignment in the application for bond, the execution of the bond and the construction contract, all relate to the same subject matter, and are treated as essential parts of one transaction.[150] This particular assignment, in the setting in which it arises, would seem to be analogous to the purchase money mortgage situation which Chancellor Kent, in his Commentaries, discussed as follows:[151]

> ". . . In one instance, a mortgage will have preference over a prior docketed judgment, and that is the case of a sale and conveyance of land, and a mortgage taken at the same time, in return, to secure the payment of the purchase-money. The deed and the mortgage are considered as parts of the same contract,

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[144]For cases applying these provisions see: *Lacy* v. *Maryland Cas. Co.*, 32 F. 2d 48 (4 Cir., 1929); *Bridgeton Natl. Bank* v. *Commercial Cas. Ins. Co.*, 180 Atl. 832 (N.J. 1935); *Wike* v. *Board of Trustees*, 49 S.E. 2d 740 (N.C. 1948); and see generally *Brent* v. *Bank of Washington*, 35 U.S. 596, 9 L. Ed. 547 (1836).

[145]*Steelcraft Mfg. Co.* v. *Hewkin*, 148 F. Supp. 872 (DC., Ill. 1956).

[146]*Harrison* v. *Sterry*, 9 U.S. 289, 3 L. Ed. 104 (1809); *Conard* v. *Atlantic Ins. Co. of N.Y.*, 26 U.S. 386, 7 L. Ed. 189 (1828). See also the reasoning in *Brent* v. *Bank of Wash.*, 35 U.S. 596, 612-615, 9 L. Ed. 547, 554-5. The same result was also reached at common law under the king's prerogative right of priority. See *State of Md.* v. *Bank of Md.*, 6 G. & J. 205 (Md. 1834); *Marshall* v. *People of State of N.Y.*, 254 U.S. 380, 382, 41 S. Ct. 143, 144, 65 L. Ed. 315 (1920).

[147]*Royal Ind. Co.* v. *Board of Education*, 137 F. Supp. 890 (DC, NC, 1956); *Alabama Tenn. Nat. Gas Co.* v. *Lehman-Hoge & Scott*, 122 F. Supp. 314, (DC, Ala. 1954); *U.S.* v. *Crosland Const. Co.*, 120 F. Supp. 792 (DC, SC, 1954), affd. on the only ground raised by Govt. on appeal, 217 F. 2d 275 (4 Cir., 1954); *Seaboard Surety Co.* v. *U.S.*, 67 F. Supp. 969 (Ct. Claims 1946), cert. denied 67 S. Ct. 863; *U.S.* v. *Long Island Drug Co.*, 115 F. 2d 983 (2 Cir., 1940); *National Iron Bank* v. *Manning*, 76 F. Supp. 841 (DC, NJ, 1948).

[148]*Salem Trust Co.* v. *Mfgrs. Finance Co.*, 264 U.S. 182, 44 S. Ct. 266, 68 L. Ed. 628 (1924).

[149]Commentaries, Vol. 2 *442.

[150]*Geitz* v. *Gray*, 280 S.W. 2d 859, 864 (Mo. App. 1955).

[151]*Federal Natl. Bank* v. *Commonwealth*, 185 N.E. 9, 12 (Mass. 1933); see also *Conard* v. *Atlantic Ins. Co. of N.Y.*, 26 U.S. 386, 445, 7 L. Ed. 189, 214 where it was said: "The whole instruments must be taken together, and construed as one entire agreement."

[152]Vol. 4, *173-4.

and constituting one act; and justice and policy equally require that no prior judgment against the mortgagor should intervene, and attach upon the land, during the transitory seisin, to the prejudice of the mortgagee . . ."

Another high authority, Mr. Pomeroy, says that a purchase money mortgage has "intrinsic superiority" and that it not only takes precedence of a prior judgment, but it also cuts off or prevents the attachment of any lien upon the premises which might otherwise have affected them.[152] In effect, it is a limitation upon the title which the mortgagor takes, rather than an encumbrance upon the title conveyed; or as otherwise stated:[153]

"One who executed a purchase-money mortgage is not regarded as obtaining the title and then placing an incumbrance on it. He is deemed to take the title charged with the encumbrance, which has priority even over pre-existing claims."

It has been asserted to be the opinion of the Internal Revenue Service that purchase money mortgages take priority over federal tax liens, even where the tax lien is of record prior to the purchase money mortgage.[154] A similar result has been applied to a conditional sales contract which was subsequent to a recorded federal tax lien against the purchaser.[155] On this analogy, viewing the assignment to the surety as an integral part of the transaction, by which the chose in action had inception, it should not be affected by federal tax liens, even where the tax lien is filed of public record prior to the construction contract and the assignment.[156]

As discussed above, the Supreme Court has considered the effect of a federal tax lien upon the interests of others. However, in every instance since the 1950 line of decisions, the interests of others consisted of state statutory liens. There, the court seemed concerned with the proposition that the state cannot by statute impair the standing of federal liens without the consent of Congress.[157] The Supreme Court, having granted the government's petition for certiorari in the *Ball* case, will now, for the first time, be confronted with the interest of another consisting of an antecedent contractual right, arising as a part of the transaction by which the chose in action had inception.

The commercial world will await the outcome with extraordinary interest because the government's position, if successful, might subordinate a widely used credit arrangement—an assignment of money, due or to become due under an existing contract, as collateral security – such subordination being to a federal tax lien against the assignor, which tax lien was not in existence when the assignment was made, but arose subsequently.

In the contest over contract funds, where the competitor is a federal tax claim against the defaulting contractor, the situation usually centers around one or more aspects of the no debt concept, as discussed above. Wherever the defaulting contractor could not establish the existence of debt in his favor, this means he has no property in this respect. No property in him, necessarily means no property for the government's tax claim rights to attach to. The result is, to eliminate both the contractor and the government in the contest over contract funds, and thus restore the field to the basic interests of others—the owner, suppliers and the surety. In addition to the surety's contract rights, upon payment the surety is subrogated to all the rights of the creditor. In all the cases in the appellate courts, the subrogation rights of the surety have prevailed over the competing federal tax claim.[158]

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[152]Pomeroy, Equity Jurisprudence, Sec. 725.

[153]*Troyer* v. *Mundy*, 60 F. 2d 818, 821 (8 Cir., 1932).

[154]Mosner, The Nature and Scope of Federal Tax Liens, etc., 17 Md. L. Rev. 1, note 25 (1957).

[155]*U.S.* v. *Anders Contracting Co.*, 111 F. Supp. 700 (DC, SC, 1953).

[156]See *U.S.* v. *Long Island Drug Co.*, 115 F. 2d 983 (2 Cir., 1940).

[157]*U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954).

[158]*United States Fidelity & Guaranty Company* v. *Triborough Bridge Authority*, 74 N.E. 2d 226 (N.Y. 1947); *United States Fidelity & Guaranty Company* v. *U.S.*, 201 F. 2d 118 (10 Cir., 1952); *U.S.* v. *Crosland Construction Co.*, 120 F. Supp. 792 (DC., SC., 1954) and cases therein cited, affirmed on the only ground raised by Government on appeal, 217 F. 2d 275 (4 Cir., 1954); *Vincent* v. *P. R. Matthews Co.*, 126 F. Supp. 102 (DC., N.Y. 1954); *Colussa-Glenn Production Credit Assn.* v. *Phoenix Ins. Co.*, 145 F. Supp. 844 (DC., Cal., 1956); *Aetna Cas. & Surety Co.* v. *Horticultural Service, Inc.*, 158 N.Y.S. 2d 750 (App. Div. 1956). In this last case, the court fell into error, it is believed, in awarding superiority to one of the federal tax liens which antedated the bond. Proceeding on the no debt concept, as the court necessarily did in relying on the *Triborough* case, no debt means there is nothing in that respect for any federal tax lien to at-

Summary

Congress has never said that a third party shall be liable for the federal taxes of another party. Neither has the Supreme Court. It would, however, be the equivalent to take the property of the third party, but Congress has never said this may happen. The Supreme Court has held the opposite. Congress has never said that the government shall have an interest in the tax debtor's property greater than the tax debtor himself possesses. The Supreme Court has held the opposite. These opposite views occurred in the course of displacing the interest of every competitor of the government to come before the court since 1929 under the priority statute, and every competitor of the government, but one, to come before the court since 1950 under the tax lien statute. All displaced competitors were, however, owners of state statutory liens. None were owners of a contractual right, and in this area the *Ball* case presents the first case for decision by the Supreme Court under the tax lien statute. Originally, the government had a section 3466 priority among unsecured creditors and an ordinary lien for taxes under section 3670. Prior to the mentioned years, for 132 years under 3466 and for 84 years under 3670, both the federal priority and the tax lien were construed to respect the integrity of pre-existing interests of others. This respect was impaired by the detour roads built by the Supreme Court starting in 1929 and in 1950, without the aid of Congress. There is no Congressional time bomb in antecedent interests.

Suppliers with an antecedent mechanic's lien under the "Pennsylvania" system, have been displaced by the Supreme Court in favor of a subsequent federal tax lien, for reasons undisclosed. Other courts continue restless.

Suppliers with a mechanic's lien under the "New York" system, have, with one exception, prevailed over a federal tax lien; the no debt concept being invoked to entitle the suppliers, and not the defaulting contractor, to the earned but unpaid contract fund and the government's right can rise no higher than the defaulting contractor's. The same concept has also been invoked in accordance with the construction contract and in accordance with the general law of contracts.

The surety of a defaulting contractor, by subrogation and by contract rights, is entitled to contract funds, to the exclusion of a federal tax claim against the contractor.

Conclusion

If the Supreme Court does not abandon the detour roads it has built, without the aid of Congress, under both the priority statute and the tax lien statute, then Congress should examine the judicial legislation, particularly in the light of the definitive policy Congress has expressed in the bankruptcy act.

tach to. The case is pending on cross-appeals to the N.Y. Court of Appeals. See also other cases cited in note 146, supra. An early analysis appears in McCahan, Surety's Rights as affected by Claim of U.S. for Contractor's Unpaid Taxes, Report of Proceedings at Chicago meeting, American Bar Assn., Section of Insurance Law 1943-4, p. 199.

"Held Covered" Clauses in Marine Insurance Policies

Stanley B. Long*
Seattle, Washington

THESE observations are not intended as an exhaustive or legalistic study of all aspects of "held covered" clauses in marine hull and cargo policies. Rather, it is hoped that the comments and suggestions to follow may prove to be of some practical value and assistance to those who write or otherwise deal with marine insurance policies as a part of their every day marine insurance business or insurance practice.

*Of the firm of Bogle, Bogle & Gates; Chairman of Marine Insurance Committee.

Origin And Purpose Of "Held Covered" Clause:

The precise origin of the "held covered" clauses in marine insurance policies has been obscured in antiquity. It appears from an examination of the early English marine insurance texts and notes of early English court decisions that some forms of "held covered" clauses were in general use and formed a part of marine insurance policies issued during the early part of the nineteenth century. For reasons consistent with its purpose, the policy provisions now commonly referred to as the "held covered" clause was for many years known as the "breach of warranty" clause.

The purpose of such a clause, however denominated, is plain. All policies of marine insurance are subject to warranties of one kind or another, expressed or implied.[1] Warranties directly and vitally affect the subject matter of marine insurance. Their breach involves serious consequences to the assured.

The Marine Insurance Act, 1906, §133, defines a warranty as " * * * a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

Excuses for the assured's noncompliance with a warranty are very limited.[2] " Where a warranty is broken, the assured cannot avail himself of the defense that the breach has been remedied, and the warranty complied with, before loss."[3] "No cause, however sufficient; no motive, however good; no necessity, however irresistible will excuse non-compliance with an express warranty." (2 Arnould § 635).

A breach of warranty discharges the insurer from liability and deprives the assured from recourse against the insurer, whether the loss can be traced to the breach or not and even though such breach was innocently or inadvertently committed by the assured. (2 Arnould § 688).

A similar problem arises where there is a deviation or change of voyage from that contemplated by the policy, even in the absence of a breach of warranty. Under the Marine Insurance Act of 1906, a *change of voyage* is defined as follows:

> "Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, it is said to be a change of voyage."

Under the act there is a *deviation* from the voyage contemplated by the policy either— (a) where the course of the voyage is specifically designated by the policy and that course is departed from, or (b) where the course of the voyage is not specifically designated by the policy but the usual and customary course is departed from.

Where there is a change of voyage the insurer is discharged from liability under the policy from the time the intention to make the change is manifested. In the event of a deviation the insurer is discharged from liability under the policy from the time the deviation physically commences, and it is immaterial that the ship may have regained her route before any loss occurs.

Because the consequences of breach of warranty, deviation and change of voyage were so serious to the assured, it was but reasonable for underwriters to find some appropriate means of protecting the assured against such consequences, provided underwriters, by so doing, were not prejudiced by being *intentionally committed by the assured* to a risk different in character from that contemplated at the time the policy contract was effected. Thus, to afford the assured that protection, the "breach of warranty" or "held covered" clause came into being and ultimately into general use as an accepted policy provision.

The obvious purpose of such a clause was to avoid the penalty attaching to a deviation, change of voyage or breach of warranty, namely, the avoidance of losses by reason thereof.

By including a "held covered" provision in their policies, underwriters agreed to forego their right to avoid the policy for deviation, change of voyage or breach of warranties within the "held covered" provisions upon condition that the assured would immediately notify underwriters of the same after learning of its occurrence and agree to pay any additional premiums required for the enhanced risk occasioned thereby.

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[1]For a comprehensive discussion of "Warranties" in marine insurance policies see: Volume 2, Arnould (1954) chapters 20 and 21.

[2]Marine Insurance Act, 1906, §34 (1).

[3]Marine Insurance Act, 1906, §34 (2).

Examples of standard "Held Covered" clauses:

London Institute
Time (Hulls):

"Held covered in case of any breach of warranty as to cargo, trade, locality, towage, salvage services or date of sailing, provided notice be given immediately after receipt of advices and any additional premium required be agreed."

London Institute
Voyage:

"Held covered in case of deviation or change of voyage or any breach of warranty as to towage or salvage services, provided notice be given immediately after receipt of advices and any additional premium required be agreed."

American Institute Time
(Hulls—1955):

"Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners."

American Hulls
(Pacific—1938):

"Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices."

American Institute
Cargo—(1949):

"Held covered at a premium to be arranged in the event of transshipment, if any, other than as above and/or in the event of delay in excess of the above time limits arising from circumstances beyond the control of the assured.

"It is necessary for the assured to give prompt notice to these Assurers when they become aware of an event for which they are 'held covered' under this policy and the right to such cover is dependent on compliance with this obligation. * * *

"This insurance shall not be vitiated by any unintentional error in description of vessel, voyage or interest, or by deviation, over-carriage, change of voyage, transshipment or any other interruption of the ordinary course of transit, from causes beyond the control of the Assureds. It is agreed, however, that any such error, deviation or other occurrence mentioned above shall be reported to this Company as soon as known to the Assureds, and additional premium paid if required."

London Institute
Cargo (F. P. A. and
W.A.—1946):

"Held covered at a premium to be arranged in the event of transshipment, if any, other than as above and/or in the event of delay in excess of the above time limits arising from circumstances arising beyond the control of the Assureds.

"Held covered at a premium to be arranged in case of deviation or change of voyage, or other variation of the adventure by reason of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment, or of any omission or error in the description in the interest, vessel or voyage. Note—It is necessary for the Assureds to give prompt notice to underwriters when they become aware of an event for which they are 'held covered' under this policy and the right to such cover is dependent upon compliance with this obligation."

"Special" or "Tailored"
"Held Covered" Clauses:

In addition to the usual "held covered" provisions printed in the basic marine forms it is not infrequent to find one or more special or hand-tailored "held covered" clauses typewritten upon or otherwise attached to the basic form. Usually such special "held covered" clauses apply to special warranties deemed necessary by underwriters for the particular risks undertaken.

The following is an example of such a special clause attached to a basic marine form:

"TRADING WARRANTY: Warranted engaged in the Assured's fishing business and confined to the waters of S. E. Alaska not south of 42° N. or beyond Cape Spencer, Alaska, or *held covered, (or held covered at rates to be agreed).*" (emphasis supplied).

Many similar examples of such special clauses could be cited with respect to particular warranties in both hull and cargo policies, in which would be found a typewritten "held covered" clause worded simply *"or held covered"* or *"or held covered at rates (premiums) to be agreed"*.

The important distinction to be noted is that such special clauses operate broadly in favor of the assured and *bind the underwriters unconditionally* except for the agreement for additional premium if required.

A court would construe such an unqualified "held covered" clause to literally mean what it says, namely, that underwriters will unconditionally hold covered any *breach of the trading warranty* (or other warranty to which such clause applies) at rates to be agreed. The purpose of the warranty is thus completely frustrated, and the problem is changed from one of policy coverage to simply one of rate or premium. *Greenock Steamship Co. v. Maritime Insurance Company, Ltd.*, (1903) 1 K. B. 367.

As a note of warning to those preparing special "held covered" clauses, the effect of which is to depart from or supersede the usual printed forms, certain well recognized rules of policy construction should always be borne in mind.

1. All provisions of the policy will be given effect if possible. *Aetna Insurance Co. v. Sacramento-Stockton, S. S. Co.*, 273 F. 55 (9 Cir., 1921); *Lowery v. Connecticut Fire Insurance Co.*, 70 F. 2d 24 (2 Cir., 1934); 1 Arnould §68.

2. Any ambiguity or inconsistency in the provisions of an insurance policy will be construed strictly against the insurer and liberally in favor of the assured. *Fireman's Fund Ins. Co. v. Globe Navigation Co.*, 236 F. 618, (9 Cir., 1916); 1 Arnould §74.

3. A typewritten or stamped clause will be given effect to the exclusion of any inconsistent printed clause. 1 Arnould § § 67, 672, 676.

Comments and Discussion:

"Held covered" clauses have been construed in a surprisingly small number of cases and, despite varying phraseology, the "held covered" clause has been given effect in favor of the assured in all but three types of situations so far presented. *First:* Where the insured voyage is abandoned before the commencement thereof and a different voyage is substituted therefor, in which event the risk never attaches and no provision of the policy, not even the "held covered" clause, becomes effective in any way. *Simon, Israel & Co. v. Sedgwick*, (1893) 1 Q. B. 303. *Second:* The "held covered" clause does not apply in favor of assured to cure his concealment of a material fact at the inception of the risk, which concealment would otherwise avoid the policy. *Hewitt v. Wilson* (1914) 3 K. B. 1131; *Laing v. Union Marine Ins. Co.*, (1895) 1 Com. Cas. 11. *Third:* Failure of the assured to give the "shortest reasonable notice" after receipt of advice of the breach to be held covered deprives him of the benefit of the "held covered" clause. *Hood v. West End Motor Car Packing Co.*, (1917) 2 K. B. 38; *Thames & Marine Co. v. Van Laun & Co.*, (1917) 2 K. B. 48.

On the other hand it has been held, favoring the assured, that notice need not be given until the deviation actually occurs where the intent to deviate did not exist at the inception of the risk. *Hewitt v. London General Ins. Co. Ltd.*, (1925) 33 LL. L. R. 243; and that delay in giving notice is immaterial if the assured himself has no knowledge of the breach until after the loss occurs. *Chartered Bank of India v. Pacific Marine Ins. Co. Ltd.*, (1938) 4 B. L. R. 942; *Hewitt v. London General Ins. Co. Ltd., supra; Metz, Decker & Maritime Ins. Co.*, (1910) 1 K. B. 132. And in other cases the "held covered" clause has been broadly construed in favor of the assured. See: *Greenock Steamship Co. v. Maritime Ins. Co.*, (1903) 1 K. B. 367; *Hyderbad (Deccan) Company v. Willoughby*, (1899) 2 Q. B. 530.

It seems clear that the "held covered" clause was *originally intended* to apply only to a breach of warranty for reasons beyond the control of the assured and not to intentional breaches ordered by the assured for his convenience or business purposes. This conclusion is based solely upon a review of the historical conditions and problems that produced the clause originally, *i. e.*, oftentimes a master breached a trading or other warranty under circumstances beyond the control of the assured and without his prior knowledge and, communications being slow or inadequate, in the absence of a "held covered" clause the policy was avoided and a loss sustained before the owner could procure additional insurance to cover the

vessel. The very language used in the conventional or so-called standard "held covered" clauses, quoted earlier in this memorandum, placing upon the assured the duty of giving notice upon "receipt of advices" indicates that the clause contemplated only those events not known to the assured until he finally learns of them from the master or some other source.

The following resolution adopted at a meeting of the Liverpool Underwriters Association in February, 1886, rather clearly indicates the basic intention of underwriters in respect to the "held covered" (breach of warranty) clause:

> "That in the opinion of this meeting it is undesirable that any change be made in the present practice, but should any underwriter find it necessary to grant a Breach of Warranty Clause, the wording of the following clause be recommended:—
>
> " 'Held covered in the event of any breach of warranty herein expressed as to voyage or cargo, if without the knowledge or beyond the control of the assured, provided advice be given and any additional premium arranged as soon as assured becomes aware of breach of warranty.' "[4]

The writer has some doubts whether underwriters, if they presently intend to exclude from the operation of the clause an intentional breach ordered by the assured, have expressed that intention with sufficient clarity to be always completely effective. It is recognized that in practice such breaches are sometimes held covered without reference to the precise wording of the clause involved—perhaps for reasons of competition or company policy.

The writer is bold enough to suggest that the tradional "held covered" clause would more effectively state the intention of underwriters if the clause were to read substantially as follows:

> "Held covered in the event of (any breach of warranty as to cargo, trade, locality or date of sailing, etc.), (deviation or change of voyage), provided:
>
> (a) such event occurs without the the actual privity or prior knowledge of the assured, and
>
> (b) immediately upon becoming aware of such event the assured shall give notice thereof to the underwriter and agree to any additional premium required."

It should be noted that properly a "held covered" clause should specify the type of event that will bring it into play, that is to say, whether it is a breach of warranty as to trade, locality, etc., or a deviation or change of voyage. However, the event specified must relate to the risk insured in order to avoid ambiguity, that is to say, a clause holding covered in the event of a deviation or change of voyage should be used only in a policy covering a specific voyage or a series of voyages, and should not be used in a policy where indiscriminate vessel movement is contemplated subject only to the limitations of a trading warranty. Much confusion has arisen from the indiscriminate use of one form or the other regardless of the adventure contemplated and sometimes both forms are made a part of the same policy.

For instance, it is quite common for a fishing enterprise to be covered by standard policy forms with additional specially written clauses or endorsements. Normally a fishing operation involves indiscriminate movement of vessel and catch over a large area, during fishing operations and on the way to market. Under such circumstances no "voyage" in the technical sense is contemplated by the policy. Notwithstanding this it is not infrequent to find in such a policy a clause providing that the assured will be held covered for deviation or change of voyage. In such a case the *proper* language to employ would be "held covered for any breach of warranty as to trade or locality", etc. This problem also sometimes occurs where the fish catch is insured under a separate cargo policy, because cargo customarily moves on definite voyages and the standard "held covered" clause in a cargo policy normally refers to deviation or change of voyage. Thus, policies covering fishing operations offer opportunities for the inaccurate draftsman to inject technically inapplicable language which may rise to haunt him at a later date. On the other hand, a basic understanding of the difference between a "breach of warranty" on the one hand a "deviation or change of voyage" on the other, will usually enable the policy draftsman to avoid such confusion.

In any event, the form suggested above can readily be adapted to either hull or cargo, under either a time or voyage policy, whether a defined voyage or series of voy-

[4] Owen, Marine Insurance Notes and Clauses, third edition, 1890.

ages or indiscriminate movement of the vessel over a broad area is contemplated.

In employing the suggested clause, or any "held covered" clause, the policy draftsman should carefully consider the following questions:

1. What type of event will be held covered? Should it be a breach of warranty or should it be deviation or change of voyage? Reference to the character of the adventure or risk contemplated will determine the answer to this question.

Examples:

(a) Cargo bound from Seattle to Manila via a scheduled carrier. The problem is one of deviation or change of voyage.

(b) Fishing vessel warranted confined to a specified geographical area. The problem is one of breach of trading warranty.

2. If breach of warranty is involved, the particular warranty or warranties should be precisely specified.

Example:

"Held covered in the event off any breach of warranty as to cargo, trade, locality or date of sailing (or other specific warranty to be included) * * *."

3. Are underwriters agreeing in advance to be unconditionally bound on any extension of the risk for an additional premium, or are underwriters agreeing only to be bound by an extension of the risk occurring without the actual privity or prior knowledge of the assured? If the latter, it would seem that more explicit language should be used than that appearing in some of the standard forms, and the all-too-frequent use of the unqualified clause "or held covered" or "held covered at rates to be agreed" *should definitely be avoided.*

4. What action must be taken by the assured to qualify for the protection of the "held covered" clause? Certainly, except under unusual circumstances, the assured should give notice to underwriters, and agree upon any additional premium required, immediately upon *becoming aware* of the need to be held covered, whether or not he has received official "advices" of the event entitling him to the protection of the "held covered" clause.

Additional Premium:

In this regard it should be noted that under the Marine Insurance Act, 1906, §31 (2)—"Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens, but no agreement is made, then a reasonable additional premium is payable."

Inplementing this statutory rule, the courts have held that the assured and underwriters must arrive at what would have been a reasonable premium at the time the breach to be held covered occurred, had they known of the breach at that time and then negotiated the additional premium. The market rate for the coverage requested controls, if there is a market rate. See, *e.g., Greenock Steamship Company v. Maritime Insurance Company, Ltd., supra; Hewitt v. London General Insurance Co. Ltd.,* (1925) 23 LL. L. R. 243.

It is sincerely hoped that the foregoing suggestions—coming from one not directly engaged in the actual business of writing marine insurance—will not be regarded as unduly presumptuous. The suggestions are offered as a result of some years of legal experience in reviewing and attempting to fairly construe and determine the effect of varied and ofttimes complicated and sometimes confusing marine policy provisions. Almost invariably a lawyer's task begins after a loss occurs and the question to be answered is — was the loss covered. If the policy is precisely worded and the intent of the parties clearly expressed in the pertinent policy provisions, a correct answer to the question is relatively easy to obtain. On the other hand, when confronted with sometimes ambiguous, sometimes inconsistent and frequently repetitive clauses in the policy the problem of reaching a fair and proper construction of the policy as a whole is exceedingly difficult. In such cases counsel can take some comfort from the recent words of Mr. Justice Frankfurter in *Calmar Steamship Corporation v. Scott,* 345 U. S. 427, 430, 73 S. Ct. 739, 97 L. Ed. 1125, (1953):

" * * * This policy insured 'only against the risks of war, strikes, riots, and civil commotions'. It was assembled —that seems an appropriate word—by superimposing on the age-old Lloyd's form layer upon layer of warranties and riders. Warranties free the underwriters from obligations imposed by riders, and subsequent riders then reimpose obligations thus avoided.

" * * * Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts".

What Is The Law Ex Contractu?

J. RALPH DYKES*
New York, New York

IS AN insurance policy contract to be interpreted according to the law of the place where it is made or the law of the place where it is to be performed?

The standard automobile policy contains no provision as to what law is to govern and this is true of most insurance policies. Of course, the policy contract is usually entered into in some one locality as New York or California, etc., but it by its terms is to be performed wherever an accident happens within the stated geographical area of its coverage. Obviously the law of the place of the accident governs the tort liability of the insured but what about the interpretation of the policy coverage? Does the law of the place where the policy contract is entered into determine the meaning or interpretation of the terms and provisions of the policy or is that meaning or interpretation to be determined by the law of the place where the accident happens or where the policy contract, as to that particular accident, is to be performed? The subject is confused. To show how complicated the subject generally can be, I quote from our bar association bulletin:

> "'*GROUPING OF CONTACTS' IN CHOICE OF LAW PROBLEMS.* In determining what law is to be applied to a contractual transaction with elements in different jurisdictions, New York, like a majority of states, has wavered among several possible solutions. It has sometimes followed the general rule that the execution, interpretation and validity of contracts are to be determined by the law of the place where the contract is made, matters of performance by the law of the place of performance. (See, *Swift & Co. v. Bankers Trust Co.*, 280 N.Y. 135, 19 N.E. 2d; *Union Nat. Bank v. Chapman*, 169 N.Y. 538, 62 N.E. 672; Restatement, Conflict of Laws, § § 332, 358). At other times it has followed the rule that the intention of the parties is controlling, with the general rule merely a guide, to be considered along with other circumstances. (See, *Wilson v. Lewiston Mill Co.*, 150 N.Y. 314, 44 N.E. 959; *Stumpf v. Hallahan*, 101 App. Div. 383, 91 N.Y.S. 1062, affd. 185 N.Y. 550, 77 N.E. 1181).
>
> "Foreshadowed by its decision in *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E. 2d 424, the Court of Appeals seems now to have committed itself to the so-called 'center of gravity' or 'grouping of contacts' theory of the conflict of laws.
>
> "Under this theory, apparently first employed to rationalize the results achieved by the courts in decided cases (see, *Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E. 2d 417), the courts, rather than regarding the place of making, or performance, or the parties intention as conclusive, lay emphasis upon the law of the place 'which has the most significant contacts with the matter in dispute.' (See, Harper, *Policy Basis of the Conflict of Laws*, 56 Yale L. J. 1155, 1163-1158; *Jansson v. Swedish American Line*, 185 F. 2d 212; *Boissevain v. Weil* (1949) 1 K. B. 482). Recognizing that this theory may afford less certainty and predictability than the rigid general rules, the Court finds in it the merit of giving to the place having the greatest interest in the problem paramount control over the legal issues arising out of a particular factual context, allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation."

The question came up for determination in the case of *New Amsterdam Casualty Company v. Stecker*, 3 N.Y. 2d 1.

In 1937, New York enacted a statute permitting spouse to sue spouse in tort but at the same time amended the Insurance Law to provide that no policy would be deemed to insure any spouse versus spouse liability unless express provision for it is included in the policy. A resident of Brooklyn had an automobile policy which

*Claims Counsel, United States Casualty Company.

was issued to him in Brooklyn by our company. The policy did not contain the extra spouse coverage. Insured and his wife were motoring in North Carolina when an accident happened, injuring the insured's wife who was also a Brooklyn resident. North Carolina permits a married woman to sue her husband for tort damages but does not have any provision relating to the insurance coverage as there is in New York. Realizing that our liability policy would not cover the husband in New York, the wife sued her husband in North Carolina. Service on the husband was no problem. The husband thereupon demanded that we defend him and pay any judgment which his wife might obtain against him.

We had to make a quick decision as to defense. The insured would not agree to a non-waiver and we were afraid to disclaim outright, for everyone having to do with the case, including North Carolina counsel, seemed to be convinced that North Carolina would not enforce the New York law as to a North Carolina accident. So we decided that we would sue in New York for a declaratory judgment which we hoped would hold that the policy did not cover the North Carolina accident, on the ground that the policy was a New York contract to be construed by the law of New York. We figured that if we could get such a judgment in New York, North Carolina would consider itself bound by it under the full faith and credit clause. We were able to get an agreement for stay of the North Carolina litigation. But before our declaratory judgment suit in New York came to trial, the husband decided that he did not want to go through with it, and his wife dismissed the North Carolina suit, thus bringing an end to the case.

But as a result of that case, several similar cases arose, seeking to avoid liability under similar circumstances. The courts were not in agreement. Connecticut held that the law of the place of the accident governed. *Williamson v. Massachusetts Bonding Company,* 142 Conn. 573. The lower courts in New York did not agree. The trial court in *New Amsterdam v. Stecker, supra,* decided that the place of performance of the insurance policy was any state where an action would be brought against the insured and that since the action was brought in Connecticut the law of that state governed the performance of the insurer's obligation to defend against that action (this was a policy issued in New York to New York residents. The accident happened in Connecticut.)

The Appellate Division reversed (1 A. D. 2d 629, N.Y.) and rendered a definite and clear-cut decision to the effect that the clear and positive mandate of the legislature is to withold coverage in spouse versus spouse automobile accident cases and that there was no inference that the exclusion of coverage was to be limited to accidents in the state of New York. Affirmed on appeal, *supra.* The Court of Appeals held, (1) that pp. 167 (3) of the Insurance Law is applicable where the accident occurs outside the state, the question of coverage being controlled by the *lex loci contractus,* and (2) that it excludes coverage against liability to a spouse whether the accident occurs within or without the state.

It is suggested that this is an important decision which should have a salutary effect where there has been considerable confusion.

The case of *Employers Liability Assur· Corp. Ltd. v. Youghiogheny & Ohio Coal Co.,* 8 Cir., 214 F. 2d 418, 8 CCH Fire and Casualty Cases, 410, states what it would seem should be the law everywhere:

> "The insurance policy involved was issued in Ohio and is, therefore, an Ohio contract, and it must be construed by the laws of that state. American Law Institute, Restatement of Conflict of Laws, paragraph 346; Matusek Academy of Music, Inc. v. National Surety Corporation, 7 Cir., 210 F. 2d 333. And the Ohio courts hold that a contract of insurance is made in the state where the last act is done which is necessary to complete the contract and bind the insured and the insurer. Equitable Life Ins. Co. of Iowa v. Gerwick, 50 Ohio App. 277, 197 N.E. 923, 926.
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> "The alleged negligence occurred in Wisconsin and, insofar as the law of torts is involved, the law of the place where the tort occurred is controlling."

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

OPEN FORUM

MEDICO–LEGAL JURISPRUDENCE

KRAFT W. EIDMAN, *Chairman*
Houston, Texas

JESSE W. BENTON, JR., *Vice Chairman*
Short Hills, New Jersey

CHAIRMAN EIDMAN: As you see from your program, this Open Forum is devoted to medico-legal jurisprudence. It was not the intention of the committee to try to have any demonstrations this afternoon in the medical-legal fields. Most of you have attended, I am certain, many of those demonstrations. We are approaching it from a little broader concept and that is the concept of the relationship between the two professions, the medical profession on the one hand, and the legal profession on the other.

All of you who are engaged in the active trial of cases in so-called personal injury fields are aware of the increasing emphasis which is being placed upon medico-legal jurisprudence. I think that practically every law school in the United States now has a program devoted to that broad field. We have our Academy of Forensic Science operating now. There are numerous writings in the field of a private nature. Most of you, I am certain, are acquainted with Dr. Smith's school that he conducted this year. I see it has become the first American Congress on Medico-Legal Jurisprudence in Chicago, beginning next week.

Your committee feels that we are fortunate in having with us men from the medical profession today, as well as from our own profession, who will discuss the broad scope of the relationship between the two professions in this very important field.

The first speaker today is to be Mr. Joseph Stetler, Jr., of Chicago. Joe Stetler is now Director of the Law Department of the American Medical Association. He was born back in 1917 in Ohio, married, has four children. He has devoted a large part of his practice of the law to serving the medical association. He is conversant with the problems which confront us and conversant with those which confront the doctors.

He has been active in the program between the American Bar Association and the American Medical Association in developing teaching techniques, in developing symposiums in clinics in this important field. I know that each of you will be interested in what Joe Stetler has to say to you this afternoon about the efforts of our sister association in this important field. Joe Stetler! (Applause.)

Contributions of The American Medical Association

MEDICO–LEGAL JURISPRUDENCE

C. JOSEPH STETLER
Chicago, Illinois

IN MARCH of this year the American Medical Association conducted a medicolegal conference in Philadelphia and your chairman, Mr. Eidman, kindly consented to give a talk on the subject of Trauma and Cancer. In exchange it was agreed that I would attend your meeting today and discuss the activities of the Law Department of the A.M.A. I realize full well that you folks got the worst of that

bargain; however, I am personally very grateful for the opportunity to participate in your annual convention and to talk with you about some of the phases of our work.

During the past two or three years I have been privileged to meet and be associated with many of your individual members; however, I hope that after becoming acquainted with your organization at this meeting, we can work together even more closely and actively in the future.

At the outset I would like to outline briefly the organizational structure of the Law Department of the A.M.A. and comment on some of our more important and recent activities. I would also like to refer more particularly to our activities with respect to medical expert testimony and medical professional liability.

The present Law Department, which was created in August, 1954, acts as the principal legal advisor to the Board of Trustees, the House of Delegates and the officers and the executive staff of the association. As you might imagine, the legal issues involved in this work are comparable to those facing any corporation as large and with as many and as varied interests as the A.M.A.

The professional staff of the Law Department, which consists of five attorneys, in addition to myself, provides staff assistance to four councils and committees. They are the Committee on Legislation which, in cooperation with the Washington office, handles the extensive interests of the A.M.A. in national legislative affairs. Next, the Judicial Council, the supreme court of the medical profession on questions of medical ethics. The Council on Constitution and Bylaws, which receives and processes proposed changes in the Constitution and Bylaws of the Association. And last, the Committee on Medicolegal Problems. This committee is composed of experts in the field of forensic medicine, including specialists in pathology, psychiatry, chemical tests for intoxication, blood tests to determine paternity, medical professional liability and others.

In addition to liaison activities within the association, the department maintains active contact with the state and county medical societies and with other individuals and organizations interested in legal medicine. In its efforts to supply current information to such persons and groups, the association has, for over thirty years, prepared and published in The Journal each week, abstracts of reported cases in the medicolegal field or decisions of particular interest to physicians. In 1932 it was decided to publish compilations of these decisions in book form. We have just begun the preparation of the sixth volume which will include cases reported in the years from 1953 to 1956 inclusive.

Approximately two years ago a special column entitled, "Medicine and the Law", was initiated in The Journal of the A.M.A., in which we publish articles and information in the medicolegal field, ranging from medical testimony to autopsies, from legal hazards in the use of research drugs to tax problems, and from hospital records to the medicolegal aspects of artificial insemination.

In connection with some of the more specialized medicolegal activities we have worked with our Committee on Medicolegal Problems in supporting the Model Post-Mortem Examinations Act, as approved by the National Conference of Commissioners on Uniform State Laws. A manual is being prepared, dealing with the scientific background of chemical tests for intoxication and the introduction of the results of such tests in court. A report has also been prepared in connection with paternity proceedings and the medicolegal application of blood grouping tests. In addition, a compilation of over fifty medicolegal forms with accompanying legal analysis and case citations has been prepared and will be distributed in booklet form to physicians and attorneys.

The department has greatly accelerated its efforts in the past two years in the improvement of relationships between physicians and attorneys. We have encouraged and participated in joint conferences at the local, state and national level.

In October of 1955, the association sponsored the first of a series of regional medicolegal conferences in Chicago, Omaha and New York. Discussions at these meetings involved traumatic neurosis, trauma and disease, medical expert testimony and medical professional liability. A mock trial demonstration was also presented in an effort to demonstrate to physicians and attorneys the proper method of preparing

the medical witness and in presenting medical testimony in court. The demonstration has since been presented in fifteen different areas and has been seen by over 7,500 physicians and attorneys.

The second series of meetings was held in March of this year in Atlanta, Denver and Philadelphia and dealt with trauma and cancer, chemical tests for intoxication and expert medical testimony.

At these last meetings over 1,000 doctors and lawyers from forty-four states attended. We are enthusiastic about the good effects which these sessions have had in stimulating a better rapport between the two professions at all levels, and we hope to continue to have them every two years in three different cities.

Before commenting specifically on medical testimony and professional liability, I would like to mention one last project which has been very successful. Together with the A.B.A. and with the financial assistance of the Wm. S. Merrell Company, drug manufacturers of Cincinnati, Ohio, we are presenting a series of six medico-legal films. The first was based on our mock trial demonstration and is entitled, "The Medical Witness"—and which I understand you are going to see later this afternoon. The second film, entitled, "The Doctor Defendant", dealing with medical professional liability, was previewed in New York at our annual meeting last month. All of the other subjects have not been selected as yet. Two of them, however, will deal with forensic psychiatry and forensic pathology.

Now then, a word about medical testimony. In my work with the medical profession during the past few years, I have come to the realization that practically all doctors have an aversion to appearing in court and testifying in a lawsuit. Although a few have had unpleasant experiences as witnesses, most have been frightened by the exaggerated reports of a colleague, of "murderous cross-examination" by opposing counsel.

In fairness to the doctor, however, it must be recognized that there are some basic reasons behind this aversion which deserve serious consideration. First, there is a fundamental difference in the method of approach of law and medicine so far as the discovery of truth is concerned. The lawyer attempts to maintain his position by argument and contention with opposing counsel. His life is one of advocacy of causes; his object is to magnify his own arguments and to belittle those of his opponent. The physician, on the other hand, does not live by contention. His training is in the free and open atmosphere of the laboratory, hospital, sickroom or private office. He demands a full and frank discussion and disclosure of all phases of a case. When all pertinent data are collected, he correlates them and forms a judgment with reference to the illness. By training and practice, therefore, the whole tempo and attitude of the day-to-day experience of the physician and lawyer are totally different.

Another reason for the doctor's hesitancy to act as a witness is his failure to understand the concept of examination and cross-examination. It appears to the average medical witness that while one attorney is trying to establish the truth, opposing counsel is trying equally hard to keep the truth from being brought before the jury and court.

The physician also dislikes the time that court cases take from his practice—and it is not because he fears he might lose a fee. Physicians today are very busy people with morning, afternoon, and sometimes all-night hours. The effect of stories about doctors cooling their heels in court for hours on end while lawyers argue seemingly obscure legal technicalities is difficult to overcome.

I believe it is unfortunate but true that the average physician's attitude toward a court appearance was summed up in a recent statement by a man who is a doctor and a lawyer, in an article published in the American Medical Association Journal. He said, in part:

"To the physician, the courtroom means wasting valuable time to give a carefully restricted opinion, necessarily based on inadequate observation, for persons who cannot understand the details of the problems and who probably will not believe him anyway."

It is obvious that in the interest of both professions, and particularly the public, this attitude on the part of the physicians with respect to medical testimony must be overcome. The need for an all-out effort is obvious from the fact that from 65% to 80% of all cases tried today require

such testimony; that seven out of ten personal injury cases are decided on medical rather than legal considerations. During the past decade, medicine has been making tremendous strides—amazing progress with surgery and with drugs. Doctors are now able to do new, unusual and complicated procedures. Consequently, when these procedures become germane to a litigated case, an ethical and qualified physician should be available and willing to testify. Juries cannot and should not evaluate these matters without expert medical advice.

Further, the role of the medical witness should not be played by a few. It is appalling to note the unprofessional and unethical actions of *the few* doctors who have become "professional witnesses" for plaintiffs and defense counsel. We consider this new "medical specialty" as an injustice to the profession and the public and intend to do our best to eliminate it. In this endeavor we are seeking the active assistance of the legal profession, for we know, as you do, that wherever a doctor is testifying improperly there is at least one lawyer encouraging and coaching him.

Medical Professional Liability

There is obviously much more that could be said on medical testimony, but before I close I would like to say a just few words about medical professional liability.

Although this is not a new problem, it has, through a combination of recent circumstances, demanded an inordinate amount of attention from individual physicians and medical organizations. Some of the causes for this increased emphasis are the tendency of the public to seek financial remuneration for real or imaginary damage; the increasing tendency of juries to award more frequent and higher judgments; and inflation, necessitating higher payments for claims, judgments, and defense. The unfavorable articles in lay magazines dealing with medical care in general have also played a part. They have created antagonism against the physician, while the favorable articles on new drugs, methods of treatment, and modern miracle surgery have in some instances been sufficiently exaggerated to lead the public to believe that a less than perfect result must be evidence or negligence.

Despite the importance of the subject and the interest demonstrated in it by the public and the profession, a complete and comprehensive national study of professional liability has never been made. For this reason, and in response to a number of resolutions presented to the A.M.A. House of Delegates requesting advice and assistance, we are now conducting an exhaustive survey.

In planning the study, it was decided that the following projects should be undertaken:

(a) An analysis of state insurance laws and regulations.
(b) A review of pertinent state statutes of limitation.
(c) An analysis of all reported cases from 1935 through 1955.
(d) An analysis of professional liability claims involving physicians in government service.
(e) A survey and analysis of pertinent state legislation.
(f) A survey of state medical societies concerning the *availability* of professional liability insurance, the most *prevalent problems* in the field, and the status of *claims prevention* programs.
(g) A survey of the professional liability insurance programs of twelve national medical societies.
(h) An opinion survey of a random sampling of 5% of the members of the American Medical Association, to determine the status of claimants and defendants as to age, sex, and occupation, negligent acts alleged, the relation of the physicians' type of practice to the alleged negligent acts, the places where the incidents occur, and the disposition of all claims and suits.
(i) The preparation and publication of special articles dealing with various facets of professional liability such as: The History of Professional Liability Claims in the United States, The Res Ipsa Loquitur Case, The Rule of Respondeat Superior, etc.

Every effort has been made to conduct the survey in an objective and judicious manner, and it is hoped that the results will contribute to existing knowledge in the field. The study will indicate the current status of the number and causes of professional liability claims and suits and

the availability and cost of liability insurance. Armed with these facts, we should be in a position to plan a long range educational program for presentation to the medical and legal professions and to the insurance industry.

The Law Department intends to continue its study of this subject in other areas. An opinion survey among attorneys and members of the judiciary experienced in the handling of medical professional liability suits will be included. There will also be a study of insurance experience and rates and a survey of comparable fields of negligence actions.

One thing is certain, however. If the present trend continues and if a physician must become increasingly apprehensive of legal suits, his own aggressive instinct will inevitably overcome his humanitarian and professional motivations. Such a doctor will be inclined to give too much time to protecting himself and less to the care of his patient. He may hesitate to assume responsibility in a case where the prognosis is poor. He will have a tendency to omit the highly successful, but slightly dangerous, medical procedures. Whether medically indicated or not, he will exhaust every possible established, laboratory aid in every case; he will, on the slightest indication, bring consultants into the case; he will prefer to keep the patient a longer time in the hospital than is necessary. By these means, although the cost to the patient is increased, the hazard to the attending physician will be reduced.

The great number of these claims and suits will inevitably have another undesirable effect. They will cause a lowering of professional prestige and mutual mistrust between the patient and his physician. This is distinctly detrimental to the health of the patient. When a patient feels a positive assurance that he is in safe hands, the solace he gets favorably affects his rate and chances of recovery.

The honest, capable, conscientious physician must also have assurance that as long as he is doing a competent job he is not going to be harassed by unfounded litigation.

Conclusion

Recently, there has been a significant increase in the interest of the American Bar Association in the medicolegal field. It is our hope that we can stimulate a similar interest in other specialized legal organizations such as yours. In particular, we are hopeful that in developing the second phase of our survey on medical professional liability, we can work with your group and with your individual members in an effort to do two things—one, to assess more accurately the attitude of defense attorneys with respect to the problems in the medical professional liability field, and, secondly, to make available the experience of insurance companies writing this type of coverage.

Let me thank you again for permitting me to appear on your program and to express the hope that our two organizations can work closely in the future. (Applause.)

CHAIRMAN EIDMAN: Mr. Stetler, on behalf of our committee and our association, I want to thank you for a very fine talk, giving each of us a better understanding of what the American Medical Association is attempting to do in this rather difficult field of medico-legal jurisprudence.

Our next speaker will be introduced by our president, Mr. Kluwin.

PRESIDENT KLUWIN: Mr. Chairman, guests, ladies and gentlemen:

When our next speaker accepted our invitation to be with us this afternoon, we were extremely pleased. It is the first time in the history of this organization that we have had the honor of having the gentleman holding the exalted position that he does address us. Our speaker, I can truthfully say, is a man of letters; he is an M.D., and F.A.C.S. and an F.I.C.S. He was born in Philadelphia in 1891. When he migrated to Atlantic City I do not know, but his history discloses that he was educated here in Atlantic City and has practiced his profession here. I say he has practiced here; I use that term advisedly because, while he is an eminent physician and surgeon, from the list of titles that he holds, I wonder when he ever found time to practice his profession. Among his titles which I found, of particular interest was the fact that he is the official physician for the Miss America Pageant. (Laughter and applause.) That is wonderful work. How do you get it? (Laughter.)

I know that he is the past president of 15 different organizations. He is the pres-

ent president of the American Medical Association. It is with real pleasure that I present to you Dr. David B. Allman, who will speak to us this afternoon on the "Professional Relationship Between Doctors and Lawyers." Dr. Allman!

The Professional Relationship Between Doctors And Lawyers

DAVID B. ALLMAN, M.D.
Atlantic City, New Jersey

IT IS, indeed, a real privilege and a pleasure for me to be here today to attend this meeting and to say a few words to you, particularly to convey to you the greetings and good wishes of the American medical profession and the American Medical Association, in particular, and hope that you will have a most successful and pleasant meeting here. I am happy at this opportunity to take a small part in your proceedings, because conferences of this type for a long time have been of great interest to me.

Despite my enthusiasm over my recently acquired and much appreciated other degree, which your president mentioned, that is an honorary law degree which I received just two weeks ago, I don't intend to pose here as an attorney. As my friend Joe Stetler, I don't propose to enter any legal discussion, but I would like to give you some of my impressions as to the workings and the functions of our professions when they are closely allied as they should be.

As a practicing surgeon in this city for a great many years, I have had more than a slight acquaintance with the legal profession. Three of my relatives are attorneys and I have worked closely with, and for, and maybe I should say against, several men whom I see here in this room, and I have had some experience with the problems which confront you gentlemen. As time goes on and I see more in our association together, I realize more the importance of this entire field of legal medicine and the absolute necessity for groups such as yours and groups such as ours establishing a continuing liaison so that we can work closely together, you as attorneys, and we as physicians. Since I have realized that more acutely I have attempted, in so far as I have been able to do wherever I could and whenever I could, to lend some impetus to making concrete efforts on the national, state, and even county levels, to bring the bar associations and the medical associations in those areas closer together because, by so doing, I think people work not only to our mutual advantage, but, in addition, they work to yours, as attorneys, and eventually, and even more important, to the benefit of the public.

We, of the American Medical Association, have been extremely fortunate during the last couple of years at least in having the full and complete support of the American Bar Association in our medicolegal activities. The present of the American Bar Association, Mr. David Maxwell, and president-elect, Mr. Charles Rhyne, have both given us their wholehearted support and wholehearted cooperation in every respect. Mr. Maxwell spoke to our Board of Trustees recently. He spoke to our House of Delegates in Seattle last December, and last month Mr. Rhyne spoke to our House of Delegates in New York City.

My predecessor, Dr. Dwight Murray, came before the House of Delegates of the American Bar Association in Chicago this past winter, and I addressed the House of Delegates of the American Bar Association in New York on July 15th.

Within the past three months, as some of you may know, the president of the American Bar Association, Mr. Maxwell, has appointed a national committee of three attorneys to work with the American Medical Association. One of them at least is here today. The chairman of the bar association committee is Judge Frank Hayman, of Charleston, West Virginia,

whom many of you probably know. I am happy to say that I am chairman of the medical counterpart, having been appointed that position by the American Medical Association. These two committees, on the national level, are going to meet and have their organization meeting in New York City a week from Sunday. They, we hope, will have even a more effective form of presenting and discussing our mutual problems, and I hope we will have a more effective form of solving the matters which interest our groups; particularly, there are four fronts which we have already been working on to a great extent on the national level.

One involves the proper preparation of the medical witness. You have heard something about that and you will see more about it shortly.

The second area where we have worked together involves the development of harmony between the two professions through the adoption of inter-professional codes of understanding.

The third is concerned with the field of narcotics addiction.

The fourth deals with enactment by Congress of the Keogh-Jenkins Bill, which is now being seriously considered and for which bill the American Bar Association is carrying the ball at the present time. I'm particularly interested in these inter-professional codes, the first of which, I believe, was adopted by the Cincinnati Bar Association and Cincinnati Academy of Medicine. Numerous other county bar associations and medical associations have since followed and they have either adopted or they are working on some form of inter-professional codes. They are studying such agreements with the hope of arriving at some conclusion.

At present about 25 associations have adopted such codes already. While these codes will not, in and of themselves, eliminate any inter-professional friction, they do create a certain bond between our professions, and they establish a basis which will eventually bring much good to both of us.

The joint A.M.A. and A.B.A. committee, which deals with narcotics addiction, has a great responsibility, not only to physicians and attorneys, but also the public as well. We are very much interested in working with this group and we are certain that, together, this group of doctors and lawyers can answer some of the problems that have been baffling us for many years. When that is done we hope that we will be able to see a little more light in this serious field of drug addiction.

As you know, the American Medical Association has also been active for several years in connection with national legislation. As former chairman of our Committee on Legislation for four years, we worked diligently on bills giving the self-employed certain tax status which we do not now have, but which persons working for corporations do have. As I say, the American Bar Association is taking that on and working on it in a very diligent manner with high hopes that something may come of it, if not in this session of Congress, probably in the next.

Our opinion in the American Medical Association that there are many areas currently of interest in Congress that need, in fact, they demand, the type of expert advice that can only come from associations such as yours and such as ours—we hope that the work that the lawyers are now doing on the Jenkins-Keogh Bill marks the beginning of a more active interest of the American Bar Association and of your Association in these joint legislative efforts. I feel that we have surely neglected, that we have our noses too close to our grindstones, to pay attention to what is going on in the halls of Congress. I think it is time that we should take a more active interest and give the men in Congress the benefit of our advice.

The last item I would like to comment on, and one which you, as insurance counsel, are interested in, concerns the role of the medical witness. Mr. Stetler has already commented on the subject, but I would like to give you some of my own personal observations before you see the film.

In my medical practice I have been called many times by the various attorneys to testify, sometimes as attending surgeon, many times as a medical expert, as examining physician for various insurance companies for whom I did work. I dare say I have experienced most of the displeasures and most of the pleasures also of appearing as a witness in court.

I think probably the more experience a doctor has, the more he realizes it isn't all bad, that sometimes it is a very pleasant

experience, maybe not enjoyable, but certainly he has the opportunity to get up there and express himself freely in the interest of justice as to exactly how bad, or how little, the claimant involved may have been injured. In connection with the displeasures, I believe perhaps the most frequent complaint of the physician is that he is called away from a busy practice and probably the most frequent complaint that you attorneys have about the physician is that you can't get cooperation from him just exactly when you want it and he doesn't seem to be willing to drop whatever he is doing to come at your beck and call. When you do get him, he doesn't have for you, or doesn't give you a full, complete medical report. Unfortunately, sometimes he doesn't give it to you because he doesn't have it. Other times, he doesn't have his file, and other times he may be just too busy to look it up, and his secretary may be out and she is the only one who knows where to find it.

Why do physicians and attorneys clash so often? It usually starts with the first contact. You gentlemen need the physician—particularly if he doesn't know you or hasn't done much work with you or for you—and you call him, and you want to talk to him, and you want the thing that very afternoon. You may want to see him about some patient he treated two months ago or two years ago and the physician is busy when you call. He is busy with current patients. The one you want to talk about is well and that is water over the dam as far as the doctor is concerned.

He is busy this particular day with current appointments and he is busy the next day and for several days and therefore, he is very reluctant to drop what he is doing and discuss the case with you this very afternoon, although, to you it may be important because you have various other work to do before the case comes to trial. You get a little bit angry because he wants to see you tomorrow or the day after tomorrow instead of today. He gets a little disturbed because you don't appreciate that he is very busy taking care of sick people which, in this case, would include himself, because he is sick at the thought of going to court.

After a few more phone calls you fellows finally get to see the doctor or you settle for a report from the doctor which is very frequently, as I said, totally inadequate for what you want. Then you have to call him up again and bother him and he gets further annoyed.

Finally, when the day for the trial arrives and the doctor, after using all legitimate and illegitimate excuses for not appearing in court to testify, finally does appear, and after you explain his responsibilities as a citizen and to the patient and all that he finally does go there, and when he gets there, as Joe Stetler says, he has to cool his heels while either somebody else is testifying or some problem of law which, to him, is not important, may take a period of time. What is even worse, which, to me was worse, I would walk into court, having been called. I was supposed to be there at X hour. I come in and the judge says that court is adjourned for ten minutes. Then you come back and for half an hour you are sitting around there.

The physician who appears as a medical witness comes with the thought that he can collect his fee. He is going to court on the assumption that you or somebody else is going to pay it and he doesn't get paid. Of course, he is sore at the whole legal profession and he is angry at the whole court procedure.

Here I will interject one of my own pet gripes. It is probably the only gripe I have against you fellows as a whole. As I say, I have done a lot of work—this is good for my several friends in the audience. You tell a doctor that you are going to need him Tuesday.

"Fine, let me know what time Tuesday."

"All right; we are going to need you Tuesday morning."

On Tuesday morning the doctor, if he is sincere and willing to appear, arranges his schedule for Tuesday so that he can be free at any moment when you call him to go to court. He stays very close to the telephone and there are lots of things he doesn't do on Tuesday. He doesn't schedule, because he knows he is going to be called almost any minute and he puts them off until Wednesday. Consequently, he is going to have Tuesday's work on Wednesday because he is just coasting along on Tuesday waiting for you to call him.

Along comes about two or two-thirty and you haven't called yet. So he thinks he will call you and find out whether you are

really going to need him that day, so he can do what he wants to do. Of course, you are not there but your secretary is there.

He says, "What can you tell me about the case of Jones versus Smith?"

"Oh, doctor, that was settled this morning." (Laughter.)

If you fellows would only call the doctor up and tell him when it is settled I am sure he would appreciate it. I know I would. It is the small thing. That is the kind of thing that irritates the doctor. He goes on call for court; if he is really a sincere doctor he is on call and he is ready to go at any minute. Then you fellows settle the cases and forget all about the doctor. I know why you forget about telling me, but it would be nice if you really thought about it.

The witness in this medical film that you are going to see appears as the expert medical witness called by the plaintiff, but he could just as well be characterized as a witness for the defense as far as his activities and his testimony go, as you will see. The points brought out are applicable both as the physician or the medical witness. In either case, he should, of course, testify honestly without equivocation, without any reservation. He should call the shots as he sees them. He may be wrong; he is human. But he should call his shots as he sees them. He shouldn't color his remarks in favor of either side. Of course also, this is a difficult thing to do but he must remember not to do it, that is, he should not become an advocate.

For our part, in the American Medical Association, I assure you we are sincerely attempting to work with doctors in their responsibilities in the courtroom and preparation of proper medical records which play an important part in litigation.

Many times you get inadequate and incomplete records from the doctor. Sometimes the better the doctor, the worse his report. I also assure you that we, of the American Medical Association, are interested and we are eager to work with groups such as yours and with you as individuals toward bringing about a more satisfactory arrangement along these lines.

I want to thank you for this opportunity to meet with you today and, if I can be of any assistance to you individually, or during my term as president of the American Medical Association, you can be certain I will be willing to cooperate in any way possible. (Applause)

CHAIRMAN EIDMAN: Dr. Allman, on behalf of our association, I want to thank you for your graciousness in taking time from an extremely busy schedule to be with us and to give us a better understanding, from the viewpoint of the American Medical Association, of their views toward these common problems.

Mr. Benton will introduce our next speaker.

MR. JESSE W. BENTON, JR.: Ladies and gentlemen, our next speaker is Emile Zola Berman. He was admitted to practice in the state of New York in 1925. He is a member of the American Bar Association, New York State Bar Association, the Association of the Bar of the City of New York, and has served on the committee in Superior Court. He is president and a member of the board of directors of the Metropolitan Trial Lawyers Association, a member of the Federation of Insurance Counsel, a member of the board of trustees of the International Academy of Trial Lawyers. He has been a member of the faculties of the law schools of Columbia University and New York University, teaching courses in trial tactics, and has acted for many years on the same subject for the Practicing Law Institute and many state and local bar associations. He served in the United States Air Corps as Lieutenant Colonel in the China-Burma-India area and recently was the defense counsel for Sergeant McKeon in his court martial trial on Parris Island.

He is an outstanding advocate of the just result as opposed to the more adequate reward. The subject today is "A Lawyer Looks at the Doctor." (Applause.)

A Lawyer Looks At The Doctor

EMILE ZOLA BERMAN
New York, New York

DR. ALLMAN, Counsellor Stetler, welcome. Officers and Directors of the Association, my brethren of the bar, and ladies and gentlemen:

There was one thing that Dr. Allman said, if I quote him correctly, about the film which makes me think that when I represent a defendant I just don't get that kind of witness. As I understand it, he says, ". . . if you are going to be a witness for the plaintiff—but it could just as well be characterized as a witness for the defense." It doesn't happen like that at all, Doctor, and that is where the nub of the problem is.

What I have to talk with you about is not at all related to our social and gregarious attitude, nor, indeed, even with our affection for the medical profession. My thoughts here spring from our common concern, if not our common approach, to the resolution of medico-legal problems under our judicial system of administering justice.

In the face of the work which has been instituted by the American Medical Association, as you just heard, I venture to believe that what I have to say is not yet obsolete. [Laughter]

To use the same statistics and to pose the problem in its most acute form—I think statistics now are pretty replete from all over this country—75 per cent of all litigated cases are cases that involve the problem of determining the damages that have resulted from negligence or wrong-doing. They are cases that involve actual determination of fault, but more particularly, problems of injury, that is to say, a question of fact. I emphasize that. For us it becomes a resolution of a question of fact as to whether trauma is related in any way to the claimed injury or disease or, in many instances, whether the cause and consequences of the disease as such are affected by trauma at all.

It has been referred to here that Professor Ben Small of the University of Indiana, as recently as 1955, made a survey of negligence and compensation cases and wrote as follows in the American Bar Association Journal, and I quote:

> "It seems fair to estimate that seven out of ten contests turn, not upon doctrines of law, but upon medical evidence as to what the particular harm is and what caused it to come about."

I think his figures are a little high but, nevertheless, this is enough to bring into focus our problem since we, of the law, and the men of medicine are involved so frequently in the currents of lawsuits. It becomes important to suggest what it is that we expect from our medical witness, particularly if it is true that on the defense side our medical witness is rarely the treating doctor but is called upon as an expert, although I believe that what I have to say in this regard applies equally to a doctor on either side of the medical question.

What I am saying to you now is that I would like the doctors to know what we expect from them and, Doctor, I would like to tell you what I see, as a lawyer, in the doctor.

First, it seems to me that we require from our medical witness competence in the specialty involved, by virtue of his qualifications, his talents, his association and experience.

Secondly, we require articulateness. We are introducing witnesses. These witnesses in a court of law do not have the last word, nor do they make the decisions. They are tested by the trier of the facts, whether it be judge or jury, as any other witness, and for a witness to deliver evidence, whether it be expert testimony or objective evidence on any factual issue, it is required that he be able to speak in such a way that his views can be understood by the lowest level of intelligence in the jury box. To do otherwise, this witness of ours fails in his function.

We, as lawyers, are not engaged in a forum of scientific laboratory, nor are we participants of the staff conference in a hospital. We are engaged in an adversary proceeding of which some of the critical facts are medical questions where we take our role as advocates.

By the way, with reference to some comment about the calm, contemplated, free atmosphere in which the doctor is accustomed to working, it may be that those meetings of various county medical associations that I have gone to are rare, where there have been raging conflicts, of which we find only the merest echo in a courtroom, between these men of calm and considerate judgment on problems of the causative factors in trauma and disease.

In any event, to resume the point, the least we expect of our witness is that he be articulate.

Third, personality. We would at least like to feel that we have brought to the witness stand, whether it be a doctor or otherwise, but I should think particularly a doctor, a personality that does not antagonize his listeners. I don't have to tell you how painful the consequences of such a personality could be in a trial before a jury, no matter how well trained and even how articulate such a witness may be.

Fourth, it seems to me that we are entitled to have from our medical witness a persuasiveness, that is, an ability to stay within the rigidly defined limits of experimental and clinical evidence in his field and in his own experience and to use that material to drive home the reason for his opinion and his views.

Again, getting to the forum of a courtroom, we are not entertaining lukewarm discussions on a level at which any decision is going to be made that has any scientific criteria; we are dealing with the rights of litigants with respect to which there will be an absolute determination in that case for all time with respect to their rights. When we produce witnesses, especially those of a highly specialized talent, we can expect and, I believe, have the right to expect, these men will bring to the witness chair and to that courtroom a persuasiveness concerning their views, which will bring ready acceptance from whomever the trier of the facts may be. Now, for inability to express—by the way, all too often instead of that, if I may interject, we find an inability to cease from speculating on the possible relationship and sometimes purely theoretical considerations involved in a court case so that our witness, who wouldn't ever be in doubt about his opinion at a staff conference, instead of being persuasive, goes through the mumbledee and mumblegee of "on the one hand" and "on the other hand", dealing now with purely theoretical and speculative considerations.

Fifth, it seems to me that we have the right to have the witness have the ability, to express scientific verities in simple language. Is it too much to ask that, when a lawyer asks a question of a doctor, he get an answer at least in the same general language to which he and the jury are accustomed? To paraphrase a theme from "My Fair Lady", "Why can't a doctor talk like a man?"

Sixth, I think that we have a right to know from our witness what are the known, valid objections to the medical theory posed by the other side. For that matter, and just as important, we who are the advocates are required to know, and are to secure his assistance to find out what are the known objections to our witness' opinion, whether those objections be valid or invalid; and finally—

Seventh, especially for those of us who deal in medico-legal litigation involving these highly controversial fields of relationships between trauma and secondary disease, it seems to me that we are entitled to know from our doctor the literature suporting our views and those opposed to the other side, and vice versa. Do you think this is an overwhelming sort of postulate that I suggest that we expect?

We, of the trial bar could find all this out, could weigh our witness, could analyze him, and properly prepare, if need be, if we were given the opportunity for a sufficient number of interviews. No one is better equipped than we are to appraise the effectiveness of this doctor as a witness in our lawsuit. But, too often, the doctor is either too busy, and I suspect, more than busy, to assure us of his own total knowledge of the subject, to give us the time for adequate appraisal or thorough preparation for his role in the courtroom as a witness. He still thinks he is going into a forum of his own selection. He still thinks that whatever has to be said on the subject at hand, his is the last word. He still is concerned to think that no one, but no one, could ever find the facts against the position he adopts and on all three points he happens to be wrong.

We are in a position to properly orient him to our forum, to prepare him for the pitfalls, to introduce him to the semantics, to advise him of our purposes, to show him the difference between the pure, final, scientific criteria of certainty and the prin-

ciples of law governing opinion evidence by preponderence of the evidence on one side as against the other. What do we all too frequently see, we, who day in and day out, in the role of an advocate, are required to look over the doctors who testify either for or against the side we adopt? By the way, I am speaking now obviously in general terms, Dr. Allman, and, to get the association off the hook, perhaps I should say I speak only for myself. [Laughter] But the fact of the matter is that we find in no small measure a shocking degree of inarticulateness on the part of medical witnesses. We find, not infrequently, inadequate knowledge or at least inadequate recollection of fundamental literature on the subject.

We find answers and explanations that contain more Latin than English. We find a smugness, if not an actual stuffiness of manner and attitude that yields only to inquiry by the judge, for here, at last, the doctor recognizes one having the same touches of omnipotence as he has. [Laughter and applause]

Finally, all too frequently we find, on the part of the doctor, under perfectly proper cross-examination, the behavior as though the doctor had a monopoly on knowledge to be obtained by literature and figures in that one small segment of medicine involved in the case at issue. This leads to a complete exasperation with the judicial purpose on the part of the medical man leading to an absolute refusal to have anything further to do with it.

Quite apart from the socio-political aspects involved in that kind of attitude on the part of one who is a part of the politics and the citizenry, this leads all too often in the courtroom to the expression of opinion by men of ineptness, or that infinitely small number of medical charlatans who, unfortunately, infinitely small as their number may be, are tremendously valuable. It is to these that the fear of court has been abandoned by reason of a great aversion of outstanding men to testify.

One of the problems, it seems to me, that becomes involved parenthetically is the doctor's approach to certain questions on the witness stand, the inability of the doctor to understand that what from him is being solicited is his opinion as distinguished from medical certainty. What happens in these cases—there are hosts of situations where etiology is unknown, and so the doctor reasons, "Well, if you don't know the cause, how can you say either nay or aye with respect to what degree trauma may have influenced the disease?" Now, that kind of philosophical problem the doctor never has in his own practice. He is not concerned with that kind of thing at staff meetings. He has no doubt in making diagnoses, or at least he proceeds with affirmation of reasonable certainty in the making of diagnoses in his own practice.

Yet, in the hypothetical question dealing with problems, as I say, where etiology is unknown, or not yet discovered, these men who have their own convictions nevertheless, because of lack of this adequate preparation, become involved with theoretical, philosophical abstrusions, and it may be perhaps, to that extent, one reason why they have aversion to the courtroom or, to use the language of Mr. Stetler, why somebody comes out and says, "Why, that cross-examiner murdered me." Nobody murdered them except their own inability and lack of preparation for the role in which they find themselves.

What is the remedy? So far as I can see it, it is exactly along the lines that these gentlemen speak. It has to get down to very, very practical levels.

This business of an inter-professional relationship requiring close harmony, from the point of view of an advocate, requires an opportunity to bring to the doctor an understanding of the courtroom, the litigating process, the function of the lawyer, and the function of the doctor as a witness in a litigating process. We can teach the rules, Doctor. We can explain them. We can tell, I think, cogently the purposes of our forum, if the doctor gives us the opportunity to do so.

When we step into a doctor's sphere, be it office, clinic, or hospital, we accept completely the doctor's authority and I am glad indeed to have it. All that we ask for our forum is the opportunity to prepare this doctor for a totally unfamiliar area.

One other point, if you will permit me, and then I will conclude. The doctor has taken note of a recently devised panacea to eliminate all this nonsense of trying medical issues. I quote to you from comments by Dr. Wasmuth, of the board of the Cleveland-Marshall Law Review, their medical commentator. I am now quoting Dr. Wasmuth, not Berman.

> "Medicine is not an exact science. It is a biological science and may not be

compared to such studies as physics and chemistry. There all variables may be controlled and a particular reaction may be accurately predicted.

"To be learned in the biological sciences one must be schooled to think in the basic or exact sciences. However, it is fundamental in the study of medicine that all humans do not react in the same manner to a given stimulus.

"Medical judgment is the product of a physician's experiences in clinical practice built upon the basic structure of sound medical education.

"To correct an almost irreconcilable difference as to basic thinking, a possible solution may be an independent, disinterested board of medical experts such as has been advocated by several judges. Such a group could examine the patient or the facts and give the court an opinion. Since the proof does not have to be conclusive, this group could decide by a preponderence of evidence."

I think some of you may recall that this program has had its origin in my own state of New York as the result of a joint endeavor by the board, the appellate division justices, our New York County Medical Society and our Academy of Medicine. Not for one moment do I decry the lofty purpose of their work. However, in the field of the relationship of trauma to disease, the controversy is right within the medical profession itself. There is a constant conflict in extending medical sciences to cause and effect of various stimuli and forces on human tissue and physiology, head injuries, arthritis, coronary diseases, cancer and a host of others. There are involved schools of medical thinking and, therefore, this independent group of doctors must turn over the resolution of the question of fact, concerning the relationship of the given cause resulting in disease, to accept a new specialist selected on the theory that he alone brings certainty to the problem. But does he?

I for one am opposed to submit, for substantial rights of litigants, to such heavy endorsement of the opinions of one man until at least the men of medicine convince each other. There is room in this inter-professional relationship, it seems to me, to utilize some parts of such a system. It would seem that, if we can persuade the doctors that we can make their lives easier in a courtroom by being given the opportunity to discuss with them and prepare them for our forum, we might also be able to settle on those questions regarding which medicine has no substantial disputes and perhaps there entertain some theory on limited grounds of having impartial panels set up by the various county medical societies.

I appreciate and welcome this opportunity to speak for the great and pressing need for inter-professional cooperation. Two great benefits may result. Medicine may exercise a therapeutic influence upon those of their own profession that are given to unjustified, unwarranted, excessive views and the trial of medical issues, under our system of the administration of justice, may be greatly benefited. I thank you all. [Applause]

Chairman Eidman: Mr. Berman, on behalf of the association, I wish to thank you for bringing before our group your views on this pressing problem and bringing to us and to Dr. Allman another side of this question. We are all working in trying to get together on the problem.

Trauma And Cancer*

Some Observations for Defense Attorneys

KRAFT W. EIDMAN**
Houston, Texas

THE BROAD scope of the subject requires delineation of the area to which the following remarks will be directed.

"Trauma" refers to a single, uncomplicated injury produced by an external physical force as distinguished from so-called "psychic trauma", and also as distinguished from chemical or bacterial trauma.

"Cancer" comes from the Latin word (*cancer*) meaning "crab". It is used here

**Of the firm of Fulbright, Crooker, Freeman, Bates & Jaworski. *Talk delivered at AMA Regional Medico-Legal Symposium, Philadelphia, Pennsylvania, March 30, 1957.

to refer to all malignant tumors.

Attorneys who defend cases in this field should have a working knowledge of terminology to the extent of knowing and understanding the sense in which the terms are used by medical experts. This will facilitate cross-examination of the plaintiff's experts and be helpful in presenting a positive medical defense. Attorneys should know the specific types of cancer such as sarcoma and carcinoma and should understand the significance of the various prefixes which are used with these basic descriptive terms.

Defense attorneys should familiarize themselves with the available literature on the subject of trauma and cancer. Several articles which deal with the medico-legal aspects of this problem and which are excellent as a starting point will be referred to during the course of this paper. Standard works on pathology are most helpful and instructive as are the works of Moritz and of Brahdy and Kahn.

A general background over and above that obtained from reading the available literature (a good percentage of which is written in language too technical for the average lawyer to understand and comprehend fully) is desirable. Time spent with specialists (medical) in the field and where the facilities are available, time spent in a research institution devoted to the study of cancer is most helpful. Those of us who live in Houston are extremely fortunate in having the University of Texas M. D. Anderson Hospital and Tumor Institute for Cancer Research available for this purpose. A day spent in such an institution with a pathologist and a surgeon who devote their time to these problems can give an attorney more understanding of the problems and better background for handling litigation than several days spent in reading.

Once confronted with a specific case, the pattern to be followed by defense counsel is similar to that which would be followed in any case where there is a serious question of causation from a medical (scientific) viewpoint.

This is not a seminar in trial tactics. Therefore, little will be said about preparation. Available discovery procedure and competent investigation should be used to determine the plaintiff's theory and to develop the facts and expert medical testimony so as to test the plaintiff's case against *the minimal criteria* which will be discussed hereafter. Expert advice and guidance from a physician skilled in this field is needed for adequate and complete preparation of each case. Careful and intelligent preparation seems to us to be the key to whatever success the defense may expect. "Bridging symptoms" testimony should be met head on with all available rebuttal proof. The same is true with respect to plaintiff's physical condition prior to the accident. Trial medical briefs prepared by medical students are often helpful. Because of the dispute which exists, it seems most important to carefully test the qualifications of the doctors who may testify on behalf of the claimant. A *positive* defensive medical theory is most important. Be prepared to put on *positive* medical testimony in favor of the defensive position by *experts of recognized standing in the field of cancer research.* Back this up with lay testimony whenever possible. In order to prepare the medical defense and to effectively present it to the jury, the defense counsel must know the exact nature of the claim which is being pressed. More detailed knowledge about the exact claim of the plaintiff is needed in this type of case. This seems true both with respect to the *details* of the accident and the *details* of the events which transpired from the date of the accident until the date of trial. We also want to know with exactness the nature of the injury and the claims of plaintiff's medical experts as to the type of cancer involved and their opinions as to the effect which trauma may have had on the plaintiff's condition.

Very little of what we may have to say on the subject of trauma and cancer will be new or original. Much has been written on the subject, and there have been very few developments in this limited field since these writings were published.

It is not the purpose of this paper to try to discuss the technical medical aspects of the problem. We are not qualified to do so. Most of the remarks will be directed to the published opinions which have resulted from litigation in this field. There are numerous opinions (both workmen's compensation and common-law actions) in which assertions have been made by the injured party that cancer was either caused by trauma or that an existing but latent cancer was aggravated by trauma. For reasons which will be pointed out, it is felt that the decisions in the workmen's compensation cases should be regarded in a

slightly different light from those in common-law actions.

While there are certain known causes for cancer, it still appears that no single common factor has been found for all types. Neither has the role of "trauma" been determined with anything approaching satisfaction. There have been at least three schools of thought (and perhaps more) concerning the relationship between trauma and cancer. These includes: (1) the belief that injury to body tissue can be and is a direct cause of cancer; (2) a belief that trauma may cause a localization of metastases; and (3) the opinion that trauma can activate or stimulate a cancer which is already present in the body but which has been latent.

Moritz[1] in his work, "The Pathology of Trauma"[2], Chapter 3, "Trauma and Tumors", page 116, states:

> "The cancerigenic potentialities of mechanical trauma would probably have long since ceased to stimulate any significant amount of scientific interest were it not for the fact that so many claims for compensation are filed each year in which it is alleged that a tumor has been caused by a mechanical injury.
>
> "There are at least three reasons why such allegations are so frequently made. The first of these is that as a rule no satisfactory explanation can be given to account for the development of a tumor. Since in most cases the cause of tumor development is obscure, any antecedent illness or injury is likely to appeal to the lay mind as a reasonable explanation, particularly if the tumor develops at the site of the previous disturbance. The second reason that mechanical injury is so often held accountable for tumor development is the frequency with which such injuries occur. Most people receive many injuries in the course of a lifetime and, according to the laws of chance, injury will be succeeded by tumor formation in many individuals quite independently of any cause and effect relationship. The third and perhaps the most important reason that victims of malignant tumors often attribute their disease to some preceding trauma is that many of them would receive insurance or workmen's compensation benefits if it could be proved that the tumor was caused by some preceding accidental injury."

Moritz continues his discussion of the subject at page 128 in the following language:

> "Although the experimental and statistical evidence cited in the preceding pages has failed to lend any support to the proposition that a single mechanical injury can cause a tumor, no direct proof has been presented that a single injury is incapable of cancerigenic effect. * * * * *
>
> "The important question as to whether or not a single uncomplicated mechanical injury may ever be regarded as the sole cause of a malignant tumor remains to be answered. * * * * *
>
> "Three different opinions might be rendered by as many different experts, on the same set of facts. One might say that in his opinion the tumor was caused or precipated or that its growth was accelerated by the injury. The second might insist that it was very improbable that the injury had anything to do with the tumor. A third might say that he didn't know what the relationship was between the trauma and the tumor." * * * * *

After quoting the statement of Ewing in 1935:

> " 'Present data confirm the view, long since adopted by pathologists, that a single trauma of normal tissues is incapable of producing a malignant tumor.' "

and of Knox:

> " 'Thus, with the advance in our knowledge concerning the nature of cancer, and its natural history, it has become more and more clear that there is no reasonable evidence of any relationship between a single injury and the production of cancer.' "

Moritz then continues with the expression of his own opinion on the subject:

> "It is the opinion of the author that, in the light of our present knowledge, the assertion that any given tumor was caused by a single mechanical injury would be unjustifiable unless it could be shown that the injury was responsible for prolonged chemical or mechanical irritation of the tissues."

[1]Alan Richard Moritz, M.D., Professor of Pathology and Director of the Institute of Pathology of the School of Medicine of Western Reserve University, Cleveland, Ohio.

[2]Second Edition, 1954.

The remarks of Stewart[3] referred to in Moritz' book and in the paper delivered by Crane[4] several years ago further illustrate what seem to be the inconsistent positions taken by certain expert medical witnesses and should stimulate some thought as to possible avenues for cross-examination.

These remarks underline the references which are frequently made to the variance in the opinions which may be expected from professional people (medical and legal), who examine the problem from different positions. To illustrate, we feel that it is generally accepted that the pathological anatomists are quite skeptical about the relationship between trauma and cancer. On the other hand, clinicians may and often do have a somewhat different point of view. Their sympathies are likely to lie with their patient who has been the victim of the accident and perhaps they unconsciously become susceptible to the reasoning process which has been variously described as: (1) giving the patient the benefit of the doubt; (2) the so-called logical or philosophical approach; and (3) the *ad post hoc* form of reasoning. The attorneys involved are partisan in their views and the patient is understandably prejudiced.

Recognized Minimal Criteria For Testing A Causal Relationship Between Trauma and Cancer

There are at least five separate points which must be considered as *minimal criteria* in testing whether or not there is a causal relationship between trauma and cancer in any specific case. These criteria have been developed over a period of time. They are recognized both by the medical profession and the courts. Russel and Clark in their article on the subject, list them as follows:

1. The previous integrity of the wounded part.
2. Proof of injury.
3. Time interval elapsing.
4. Site of injury.
5. Character or structure of the growth.

The courts have set forth these points in their opinions as being the controlling minimal criteria. An example appears in the opinion of the Nebraska Supreme Court in the case of *Wayne County v. Lessman,* 285 N.W. 579. Referring to an article in the American Journal of Surgery, February, 1936, by Dr. James Ewing, the court said:

> "The statutes of most European countries and the best American practice require that the following conditions be proved before trauma can be accepted as the cause of tumor:
> (1) The authenticity and suffficient severity of the trauma.[5]
> (2) Previous integrity of the wounded part.
> (3) The identity of the injured area with that giving origin to the tumor; a blow in one part of the body cannot be made the cause of a tumor arising in another part. * * *
> (4) The tumor must be of a type that could conceivably result from trauma.
> (5) There must be a proper time interval between the receipt of the injury and the appearance of the tumor."

Attention is invited to the opinions of the Wisconsin Supreme Court in the case of *Bruins v. Brandon Canning Company,* 257 N. W. 35 (1934), and the New York court in *Avesato v. Paul Tishman Company,* 142 N.Y.S. 2d 760 (1955).

Aggravation Of Pre-Existing Cancerous Condition By Trauma

Before discussing the minimal criteria in more detail, we should say a few words about aggravation. The following com-

[3] "The same surgeon who will testify that mammary cancer has resulted from a single trauma will at the least provocation operate for a benign lesion of the breast and would never think of warning a patient that because of his operative trauma, which usually greatly exceeds the casual industrial trauma, she should give heed to the possibility that she will develop a cancer of the breast. The same surgeon who will do all sorts of orthopedic jobs involving chiseling into bone or insertion of such objects as ice tongs or pins or screws may testify that a blow which has left no real signs has caused an osteogenic sarcoma, although he never thinks his surgery will do so nor has he ever warned a patient with the severest form of bone trauma—a fracture—to be on the lookout for a possible sarcoma. A man testifies that a blow has caused a soft part sarcoma and yet that man and his colleagues throughout the world will do hundreds of thousands of appendectomies involving the cutting of abdominal wall musculature and observe no tumors.' "—F. W. Stewart, "Occupational and Post-Traumatic Cancer", 23 Bull. N. Y. Acad. Med. 145 (1947).

[4] A. Reynolds Crane, Chief Pathologist, Pennsylvania Hospital, Philadelphia.

[5] "Medico-Legal Consideration of Trauma and Other External Influences in Relationship to Cancer"—William O. Russell, M.D., and R. Lee Clark, Jr., M.D., Vol. 6, No. 4, Vanderbilt Law Review, June, 1953, pages 868-876.

ments from Moritz will serve to point up the problem:

> "Although there is no evidence that a mechanical trauma is capable of initiating neoplasia in previously normal tissue, the possibility that it may influence tumor development in a region in which precancerous changes have already been initiated is another matter."[6] * * * * * *

Moritz continues his discussion:

> "The fact that a tumor is present, even though its existence is unrecognized, predisposes that particular part to injury from an amount of mechanical violence that would do no harm to normal structures."[7]

After discussing the findings of a number of researchers in the field, Moritz concludes:

> "In summary it may be said that there is no evidence that a crushing or cutting injury of a tumor predisposes either to local acceleration in growth or to metastasis. Intermittent pressure or massage may predispose to metatasis."[8]

Where the claim is made that an existing cancer was aggravated by trauma or that a benign tumor was caused to become malignant, then instead of establishing the previous integrity of the wounded part it should be necessary for the claimant to show that a cancer existed or that a benign tumor existed at the time and point of injury.

In discussing the postulates which apply in an aggravation case, the Louisiana court in *Taylor v. Mansfield Hardwood Lumber Company*, 65 So. 2d 360 (1953), said:

> "Seemingly, in order to prove aggravation of the pre-existing tumor by injury, it is essential to establish that tumor existed prior to the injury, that perceptible damage was done to it by the injury, and the tumor's subsequent course was accelerated.
>
> "Perhaps, however, the strongest persuasive factor in cases of this kind is the presence of symptoms that continue to give evidence of the continuance of disability from the time the injury is sustained to the time the tumor clearly demonstrates its destructive power."

[6]Page 120.
[7]Page 125.
[8]Page 131.

Discussion Of The Minimal Criteria For Testing Causal Connection Between Trauma And Cancer

A mere statement of the points or postulates forming the *minimal* criteria for testing for a causal relationship between trauma and cancer is sufficient to indicate the difficulty of finding satisfactory proof for several of them. These postulates should be considered carefully in preparing for the defense of this type of case.

The Previous Integrity Of The Wounded Part

(In cases of claimed aggravation or in cases of claimed conversion of benign tumors to cancer, the postulate would be the previous diseased condition of the wounded part.)

Since we are concerned here with the existence or non-existence of cancer, a word should be said about diagnosis. Clinical diagnosis, even with X-ray assistance, is not considered sufficient and it is doubtful that it could stand scientifically. As pointed out by Russell and Clark, the biopsy (either excision, incision or needle) is the cornerstone for the establishment of the existence (or non-existence) of cancer. Without the assistance of this type of examination (biopsy), it seems there can be no medical certainty as to the existence (or non-existence) of the disease (cancer). This would be true whether we are talking about at a time prior to the trauma, the time of the trauma, or at the time of death or trial, as the case may be. This viewpoint has been recognized by the courts and adopted in some of the better reasoned opinions. It is felt that the opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. Hoxsey Cancer Clinic, et al.*, 198 F. 2d 273 (1952)[9], should be of interest to defense attorneys. This was not a personal injury suit but was a proceeding under the provisions of the Federal Food, Drug and Cosmetic Act. However, there were certain points at issue which caused the court to express its opinion on subjects of interest in the personal injury field. In discussing the sufficiency of the evidence introduced at the trial by the Hoxsey Cancer Clinic in defense against the charges brought by the government, and in finding such evidence insufficient to raise an issue of fact, the court said:

[9]Certiorari denied.

"It is equally clear that, without regard to any general rule of admissibility of the testimony of laymen as to the existence of disease or physical injury, or as to the curative effect of drugs, when the subject of investigation is the existence of cancer, the personal testimony of the lay sufferer is entitled to no weight, since the overwhelming preponderance of qualified opinion recognizes that not even the experts can assuredly diagnose this condition without the aid of biopsy and pathological examination. Hearsay testimony of what such a person has been told by a physician is entitled to no greater weight. Except for such testimony and the testimony of the three osteopaths, two of whom did not claim to be experts on the diagnosis and treatment of cancer, and the third of whom is a definitely interested witness who testified as to ability to diagnose contrary to all accepted scientific knowledge, the testimony on behalf of the Government in the full and complete establishment of its case of misbranding is not substantially disputed. We think this so-denominated conflicting evidence is wholly insufficient to cast such doubt upon the testimony adduced in behalf of the Government as to authorize the trial Court to find that the Government had failed to carry the burden of establishing the truth of the allegations of its complaint. To the contrary, we think that the evidence in this case, considered as a whole, should, and must, induce a conviction that the finding of the trial Court that the representations were neither false nor misleading is so 'against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.' On the entire evidence we are 'left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746. We recognize, as we must, that the cause, effect and cure of cancer are so obscure and indefinite that there obtains in the entire subject an area of the unknown. It is nevertheless the duty of a Court in making determination of questions of such great public moment as those which now confront us to give weighty consideration to the experience of the past and the accepted views and findings of science as held and confirmed by such experience and as likewise shown by the weight of the testimony to be applicable to the specific facts of this case. In this, as in other similar matters, that not all, or even little, is known about the subject does not require us to disregard that which is known and established."

As stated by the court in the *Hoxsey* case, the only satisfactory method by which the presence of cancer can be established or ruled out is by *biopsy*. It is obvious that in most cases where it is claimed that trauma was a producing or aggravating cause of cancer there will be no evidence available of this degree of certainty. Usually, the plaintiff tries to meet this first point by lay testimony of the plaintiff (and perhaps others) to the effect that the wounded area was giving no trouble and was in good functional condition without any outward signs or symptoms of disease at the time of the accident. On occasions the family doctor is called upon to give supporting testimony concerning the good state of health of the plaintiff and the absence of any abnormal condition at the site of injury. Where the plaintiff has had pre-employment physicals, these may or may not throw some light upon the subject. Since it is generally accepted that the most careful clinical examinations, even when assisted by X-ray, cannot be relied upon to show the presence or rule out the presence of cancer, it is felt that routine examinations by family physicians or routine pre-employment physical examinations should not be given particular weight. However, where it is the best available medical testimony, it is and probably will continue to be accepted by the courts. A careful development of the remaining postulates can act as an offset to the absence of defensive evidence as to the first point.

In connection with a claim of aggravation of a pre-cancerous condition, the Ohio court in *Hoppe v. Industrial Commission of Ohio*, 30 N.E. 2d 703 (1940), held that the claimant had failed to make the necessary proof concerning the existence of cancer at the injury site at the time of the accident. Other cases involving the question of aggravation of a pre-existing condition are *Gantz v. Brown Shoe Co.*, 90 S.W. 2d 168 (Missouri, 1936), and *Slemba v. William C. Hamilton & Sons*, 135 Atl.

841 (Pennsylvania, 1927). In the *Slemba* case the court in effect held that the existence of the cancerous condition prior to the accident could be established by inference from the facts which were proved.

Proof Of Injury

This postulate has to do with the degree of trauma or injury. Most writers agree that there should be a showing of sufficient trauma to cause physical injury or damage in order to even consider the possibility of a causal connection between trauma and cancer. Exact proof is difficult to obtain as far as this postulate is concerned. Lay testimony often rests largely with the plaintiff. By reason of the power of suggestion or otherwise, the plaintiff is likely to testify to sufficient facts which seem necessary to establish this particular postulate. The physician who examined the plaintiff immediately following the accident should be the best source of competent expert testimony on the point. However, many of these examinations are delayed by days or weeks or are made in emergency rooms at hospitals and under other unfavorable circumstances. Adequate records are not always available. Often the claim has to do with supposed trauma to deeply seated internal organs. Here it becomes even more important that there be competent medical evidence concerning the degree of the trauma based on an examination shortly following the injury. As illustrated by some of the cases referred to in this paper, factual proof from lay witnesses can be very important on this point. This is particularly true when it is correlated with the medical defense.

Most of the decisions which are referred to in this paper could be used in connection with several of the postulates under discussion. This is true of the decision of the Wisconsin Supreme Court in the case of *Bruins v. Brandon Canning Company,* 257 N.W. 35 (1934). However, the case does illustrate the importance of proof of injury or from the defendant's point of view, the lack thereof.

Another case which discusses proof of site of injury and degree of trauma is *Wayne County v. Lessman,* 285 N.W. 579 (Nebraska, 1939). Here death from cancer of the pancreas followed a fall by the decedent from a road grader. The medical testimony indicated that it would have been very difficult for decedent to have injured his pancreas in an accident of the type in which he was involved. The evidence further showed that had he sustained sufficient injuries so as to affect the pancreas, he would not have been able to continue working thereafter (the evidence showing that he did continue to work in this particular case). The court reversing a judgment in favor of the plaintiff made particular reference to the medical proof as to what would have been the situation had the injury been sufficient to have affected the pancreas. The court remarked pointedly upon the absence of the symptoms which should have been present such as shock and vomiting. The court also commented on the proof that had the injuries been as serious as claimed, he (decedent) would not have been able to continue his work the balance of the day of the accident. This case illustrates the importance of lay testimony for the defense. It also illustrates the importance of proof under the fourth point (postulate) "Site of Injury".

Another case illustrative of the defensive use of a thorough investigation and positive medical defense in connection with this second point is *Haddad v. Commercial Motor Truck Co.,* 90 So. 666 (Louisiana, 1922). In this case, an autopsy was performed which showed that the decedent had been suffering from a large cancerous growth on his liver and that this growth had burst. The medical evidence was in agreement to the effect that it was the bursting of this growth which had produced death. No marks were found on the decedent's body which indicated that he had been struck with sufficient force to cause death. The court held there was insufficient evidence to establish plaintiff's case.

A case to be compared with the *Haddad* case is *Alford v. State Industrial Accident Commission of Oregon,* 17 P. 2d 568 (Oregon, 1932). Death resulted from the rupture of an abdominal cancer and it was claimed the rupture was caused by lifting sacks. The court pointed out that the plaintiffs' testimony was *uncontradicted* and therefore took the position that there was some evidence supporting the verdict in favor of the plaintiffs.

Time Interval Elapsing

Generally, the time interval referred to in this postulate seems to extend from something in the range of several weeks to several years. In order to meet the

requirements of this postulate, the cancerous condition must have appeared within this rather broad time limitation following the trauma. The dilemma in which the attorney representing a plaintiff sometimes finds himself because of this particular postulate is well illustrated by one of the cases discussed by William F. Martin[10] in his excellent paper before the Insurance Section of the American Bar. This is the opinion by the New York court in the case of *Denison v. Wing*, 279 App. Div. 494 (1952). Several of the cases heretofore discussed show different treatments of this point.

Site Of Injury

This postulate has to do with the classification and location of the cancer which is claimed to have been caused by trauma. To properly test this point, it is necessary that something be known about the difference between primary and secondary cancers, the various specific types of cancer, their origins and behavior patterns and about the process known as metastasis. The cancer must be classified so as to be reasonable and logical for the location of the blow and for the location of the cancerous growth. The type found must be such as to be consistent with a cancer which would be primary at the location of the trauma. Careful expert examination and diagnosis are necessary in order to reach a sound conclusion on this point.

In connection with the necessity of proof that the injury was at the site of the pre-existing cancer in order to show aggravation, see *Slack v. C. L. Percival Co.*, 199 N.W. 323 (Iowa, 1924). Death resulted from cancer of the stomach. Decedent had sustained a fall in an elevator shaft with resulting fractures of an arm and leg. Some six months after the accident it was discovered that he had cancer of the stomach, from which he died. The evidence indicated that the cancer existed prior to the fall and the medical testimony was conflicting as to whether trauma could aggravate an abdominal cancer. The court discussed the absence or proof of injury at the location of the cancer sufficient to show that its development might have been caused by the fall.

The court felt that sufficient proof of injury at the exact location of the cancer so as to support a judgment for the plaintiff was made in the Pennsylvania case of *Lucas v .Hass Co.*, 179 Atl. 876 (1935). This case also involved a stomach cancer. It was shown that the plaintiff received a rather severe blow to the left side of his abdomen.

See also the following cases on the question of site of injury: *Vanderslice v. Young*, 197 N.Y.S. 9 (New York, 1922), affirmed 139 N.E. 740; *Wayne County v. Lessman* (above); and *Sikora v. Apex Beverage Corporation*, 122 N.Y.S. 2d 64 (New York, 1953), affirmed 119 N.E. 2d 601.

Character Or Structure Of The Growth

According to Russell and Clark, the cancer which is found and which is claimed to have been caused by trauma should be of a relatively simple type. In simple language, this means that the cancer must be of a type that could conceivably be the result of trauma as distinguished from other causes. Cases which illustrate this point are *Giamalva v. Maryland Casualty Company*, 115 F. Supp. 926 (Louisiana, 1953), and *Rhodes v. American Central Insurance Company* 27, So. 2d 388 (Louisiana, 1946).

Bridging Symptoms

Warren[11] in an article entitled, "Criteria Required to Prove Causation of Occupational or Traumatic Tumors"[12], discusses the so-called "bridging symptoms" which are referred to by that term and by other terms in many of the cases. Warren says:

> "One requisite, sometimes mentioned in the literature, for the implication of a single trauma as a causative factor in tumor production is the presence of so-called bridging symptoms, i.e., symptoms that continue to give evidence of the continuance of disability from the time the injury is sustained to the time the tumor makes its appearance. Among these are continuity of pain, persistence of swelling, persistence of induration or of ulceration. However, this group of symptoms is of little practical importance in establishing causal relationship with the trauma and has no bearing from either the negative or the positive standpoint. Even in instances where a

[10]"For the Defense by William F. Martin"—"Panel Discussion—The Relationship of a Single Act of Trauma to Subsequent Malignancy", 1955 Proceedings of Insurance Section of the American Bar Association.

[11]Shields Warren, M.D., Assistant Professor Pathology, Harvard Medical School.

[12]University of Chicago Law Review, Volume 10, No. 3, April, 1943, pages 313-322.

tumor is incited by the subcutaneous injection of carcinogenic substances in experimental animals, such as methl cholanthrene, there may be no continuity of signs from the time of injection to the time of the appearance of the induced sarcoma. On the other hand, merely because inflammation, ulceration, or swelling has been present in a region, there is no certainty that the subsequently diagnosed tumor is in any way due to the conditions associated with the persisting signs and symptoms. Indeed, such signs and symptoms may actually be due to a tumor already present before the injury and masked for a time by the inflammatory and reparative processes following the trauma."

Russell and Clark also discuss "bridging symptoms" in the following language:

"One frequently sees reference in legal cases to the use of evidence called 'bridging symptoms' in establishing relationship of causal factors to the genesis of disease. As applied to cancer, these are symptoms that will continue to give evidence of the continuance of the disability from the time the injury is first sustained to the time when the tumor is known to be present and established by biopsy. Points in bridging symptoms used are continuity of pain, the persistence of swelling, persistence of induration, or ulceration following the injury. It may be possible to build a strong case on the bridging symptoms, but if the aforementioned criteria are used, it will always be possible to evaluate it honestly under the best scientific attitude of proof."

An opinion which illustrates the attitude of some of the courts to the so-called "bridging symptoms" is *Winchester Milling Corp. v. Sencindiver,* 138 S.E. 479 (Virginia, 1927). This was a death case. It was claimed that death resulted from cancer which developed in one of the decedent's ribs following a fall. The evidence showed decedent had considerable difficulty for a period of some several months following the accident and at the end of that time surgery was performed. Sarcoma was discovered. The cancer spread to other parts of the body and death followed something over a year after the accident. *Compensation* was awarded. The evidence showed that prior to the injury the decedent had been regular in his work and there was no record to indicate that he had ever been ill or complained of illness or injury of any kind. In discussing the problem under consideration here, the court said:

"Whatever view we take of the medical opinions, they are frankly and at best but theories, but taking them as they are in connection with the facts heretofore narrated and taking a common sense, practical view, as courts and commissions must take of the ordinary happenings of life, boiled down to its last analysis the medical theory is that there is a relationship between the receipt of injury and origin of sarcoma, and that the degree of injury plays no important part. With this in mind we find a perfectly healthy, strong man, who has never lost any time from work or complained of any illness, suffers an injury and from that time on is incapacitated, grows worse and worse, sarcoma develops at the point of injury, from which he dies. The lay mind, under such circumstances, can reach no other conclusion than that reached by the Commission, viz., that the sarcoma was either caused by the injury or was aggravated by it."

The court commented further that:

"* * * the courts have in general found no difficulty in cases similar to the one we are considering here, in applying the ordinary rules of evidence, and in drawing the ordinary conclusions of cause and effect from established facts, and we find none. This, we doubt not, courts will continue to do with a full sense of justification and without apology until the cause of cancer is definitely and scientifically established."

A rather clear case of aggravation of preexisting cancer and a good discussion of the unbroken chain of events theory is contained in *Zehrer v. H. H. Robertson Co.,* 4 A. 2d 845 (New Jersey, 1939).

Some courts, including those of Pennsylvania, have apparently placed considerable stress on the connection between the injury and the disease being direct and immediate rather than distant and remote. Such an opinion appears in *Grobuskie v. Shipman Koal Co.,* 80 Pa. Sup. Ct. 349 (1923). Disability was claimed for cancer of the lip which developed following a cut on the lower lip made by falling timber. Similar opinions by the Pennsylvania

court are found in the cases of *Sepesi v. Pittsburgh Coal Co.*, 174 Atl. 590 (1934), which also involved a claim of aggravation of cancer of the lip, and *Smith v. Primrose Tapestry Company*, 131 Atl. 703 (1926).

Other cases which discuss the so-called "bridging symptoms" theory, or the "chain of events" line of reasoning are the opinions by the Minnesota court in *Austin v. Red Wing Sewer Pipe Co.*, 204 N.W. 323 (1925), involving cancer of the cheek; *Lyons v. Swift & Company*, 86 So. 2d 613 (Louisiana, 1956), cancer of the stomach; *Dixie Pine Products Company v. Bryant*, 89 So. 2d 589 (Mississippi, 1956); *Taylor v. Mansfield Hardwood Lumber Company*, 65 So. 2d 360 (Louisiana, 1953); and *Pittman v. Pillsbury Flour Mills*, 48 N.W. 2d 735 (Minnesota, 1951).

While from a medical standpoint, the observations of Warren may be entirely sound, it seems quite likely that the courts will continue to do just what the court says they will in the opinion in the *Winchester* case set forth above. From a defendant's point of view the only way to meet the problem is with factual proof to contradict the "bridging symptoms" proof of the plaintiff and with a sound and positive medical defense.

Positive Medical Defense

A study of the *Hoxsey* opinion and other opinions referred to above illustrate the need for a *positive attitude* on the part of the defense towards the medical dispute involved in this field of litigation. The jury and courts must be given a sound alternative argument for the plaintiff's chain of events theory. It is not enough for the defense to merely keep saying, "No, No! Nein, Nien!"

Another opinion in which the court indicated it was impressed by the *quality* of the positive medical defense is *Rhodes v. American Central Insurance Company*, 27 So. 2d 388 (Louisiana, 1946). This was an aggravation case. There were conflicting medical opinions. The court after an interesting discussion of the medical theories advanced and of the defensive proof offered, denied an award and said:

> "In view of the established ability and proven experience of Drs. Butler and Mathews, we are amply warranted in accepting their expert opinions in the respects herein mentioned, and in the predicating thereon our own opinion as regards the cause of death. General practitioners, however honest, who testified in the case are not as competent to deal with the discussed subject matter as is one who has spent many, many years specializing therein."

A most interesting opinion by the New York court is found in *Avesato v. Paul Tishman Company*, 142 N.Y.S. 2d 760 (1955). The defense appears to have been well prepared in this case. The original claim that the cancer was caused by trauma was met so well by the defensive proof that the plaintiff shifted to aggravation. Again the defense was ready with qualified experts. Much was said about the postulates of Ewing and Pack. The court made this interesting comment concerning these criteria:

> "It was explained that even if all the postulates were satisfied, it does not establish causation. The criteria were set up to illuminate all those cases unworthy of consideration, but if all criteria are satisfied you still do not prove causation. These are merely screening devices to eliminate unmeritorious cases."

In conclusion, the court stated:

> "I find that the proof with regard to aggravation, acceleration or reactivation of the dormat cancer cells is pregnant with speculation and accordingly the motion (to strike out all evidence of permanency of the injury based on the cancer) is now granted."

In the case of *Amos v. Village of Bradshaw*, 259 N.W. 374 (Nebraska, 1935), it was claimed that death resulted from cancer of the sigmoid; and that this condition was either caused or aggravated (accelerated) by a fall which the decedent had from an electric light pole. The plaintiffs' expert had never seen the decedent. The doctors who actually performed the surgery on the decedent and other experts testified that the condition was neither caused by nor accelerated (aggravated) by the fall. The court in view of the strong medical defense stated that it was in serious doubt that this particular type of cancer could be caused or effected by a blow. The court held that plaintiffs had failed to establish their case with that degree of certainty required in Nebraska.

Other cases for suggested study are *Sikora v. Apex Beverage Corporation*, 122 N.Y.S. 2d 64 (N.Y., 1953), affirmed 119

N.E. 2d 601; *Slack v. C. L. Percival Company,* 199 N.W. 323 (Iowa, 1924); and *Giamalva v. Maryland Casualty Company,* 115 F. Supp. 926 (Louisiana, 1953).

The above opinions illustrate clearly the importance of a well-prepared, *positive* medical defense. Certainly the court and jury should be impressed when this is done. Unless it is done, the courts in most jurisdictions would have no choice except to follow the plaintiff's proof, as weak as it might be. This need for thorough preparation for a medical defense is pointed out by Martin in his paper. Any attorney who has made a study of the opinions involving the question of the causal relationship between trauma and cancer is impressed with the apparent inadequate preparation on the part of the defense in many cases.

Occupational Tumors And Workmen's Compensation Cases

Because of the time limitation, this part of the discussion will be brief. For those who are particularly interested in this field there is an annotation published in 1943 entitled, "Workmen's Compensation — Compensability of Disability or Death from Cancer", Volume XIII (New series), "Negligence Compensation Cases Annotated", pages 1-55.

There is also an excellent discussion of the problem of occupational tumors and of some of the peculiar problems which exist in workmen's compensation litigation in Warren's article. The following quotations from Warren's article will serve to give a general broad outline of the problem:

> "Occupational tumors are those neoplasms that arise as a result of contact with some exogenous agent, physical or chemical, brought about by some phase of the regular work of the individual concerned, that leads to an independent proliferation of cells.
>
> "The soundest criterion for the occupational character of a neoplasm is the proof of its occurrence among the workers of a given industry significantly more frequently than in the general population of comparable age and sex."

In discussing the classification of occupational tumors, Warren says:

> "The tumors formed as a result of agents encountered in the course of occupation affect a wide variety of tissues, and unfortunately the majority of these tumors are malignant. A useful classification of occupational tumors is that given by Hueper, a modification of which follows:
>
> 1. Direct contact tumors.
>
> (a) Cutaneous neoplasms caused by direct local action of mineral oil, crude paraffin, creosote, anthracene, solar rays, ultraviolet rays, roentgen rays, rays from radioactive substances upon the cellular components of the skin.
>
> (b) Pulmonary tumors (these are usually cancerous growths arising in the lung or the bronchial tubes), resulting from the inhalation of radioactive material, chromates, asbestos, nickel carbonyl, tarry substances.
>
> (c) Tumors of the nasal passages and sinuses following upon the exposure to radioactive substances, chromates, nickel carbonyl.
>
> (d) Neoplasms resulting from impingement of roentgen or other radiation on the deeper tissues.
>
> 2. Excretory contact tumors.
>
> (a) Tumors of the urinary tract resulting from an exposure to certain aromatic amines (aromatic amines are aromatical chemical substances containing both nitrogen and one or more benzene rings), excreted in the urine.
>
> 3. Depository contact tumors.
>
> (a) Cancers of the skin associated with the deposition of arsenicals (substances containing arensic, such as might be encountered in mining or smelting arsenic or ores contaminated with arsenic, or encountered in the use of plant or orchard sprays containing arsenic), in the cells of this organ.
>
> (b) Sarcomas of bone, leukemia, and leukemoid reactions following the storage of radioactive material in the bones.
>
> 4. Tumors in tissues as a result of parasitic infestation (by this is meant infestation by parasites such as the various parasitic worms).
>
> (a) Cancer of the bladder following bilharziasis (the disease produced by infestation with a particular kind of fluke worm).
>
> "The skin is by far the most frequent site of occupational neoplasms. This is to be expected in view of the very wide range of agents to which the skin is exposed, as contrasted with other of the tissues of the body."

Russell and Clark also have an excellent discussion of occupational cancer.

When considering the subject of occupational tumors, it must be borne in mind there is a wide variance in the provisions of the compensation laws of the different states. Sometimes such legislation does not take into account the proper spread of time within which the tumor may develop. Therefore, some of the limitation periods appear to be inequitable. Also changes in occupation may cloud the issue in that the worker may have had the exposure in one occupation and then have changed occupations during the latent period. Where this change in occupation has occurred before the symptoms of the cancer have become apparent, and the new occupation is such that it could not have contributed to causing the disease, additional problems are presented. A further problem is the fact that the compensation laws of certain states list specific chemicals by name as being recognized sources of occupational tumors but fail to take in account closely allied chemical substances which might also give rise to such tumors.

There are additional problems in connection with expert medical testimony which arise in workmen's compensation litigation and which may not occur in common-law actions. This is particularly true in those states where there are proceedings before industrial commissions who are constantly engaged in hearing medical evidence and where allowance is made for the commission's expert knowledge acquired not by formal medical education but by the practical schooling that comes with years of handling similar cases. Larson in his work on workmen's compensation cites as a good example of a case which did not require expert medical opinion evidence the decision of the Rhode Island Court in *Valente v. Bourne Mills,* 75 A. 2d 191 (1950). This case involved an injury to the left breast of the plaintiff. An attack was made on the award on the ground that there was no direct medical testimony fixing the pathological nature of the condition which resulted in the operation and that there was no medical testimony which connected the blow which the plaintiff had received with the unidentified growth which had been removed by surgery. The Supreme Court of Rhode Island in rejecting the argument which was made and in ordering an award in favor of the plaintiff, discussed the necessity of medical diagnosis in the record in the following language:

> "The first contention, as stated, if literally followed would turn a compensation case into a clinic where doctors seek to determine the 'diagnosis' of a patient's ailment and the 'pathological nature' of that condition according to the more exacting norms of medical science. The application of so strict a rule to establish the required causal relationship in the field of law, where the ultimate objective is the attainment of substantial justice according to the remedial purposes and provisions of the act, would cast an unfair burden upon a person injured by accident."

The court continued, on the subject of the lack of medical testimony on causation, as follows:

> "We concede that in the great majority of cases, such testimony ordinarily is necessary because of the seeming absence of connection between a particular accident and a claimed resulting injury. But in other cases involving special and peculiar circumstances, medical evidence, although highly desirable, is not always essential for an injured employee to make out a prima facie case, especially if the testimony is adequate, undisputed and unimpeached. Thus where, as in the instant case, injury appears in a bodily member reasonably soon after an accident, at the very place where the force was applied and with symptoms observable to the ordinary person, there arises, in the absence of believed testimony to the contrary, a natural inference that the injury, whatever may be the medical name, was the result of the employment."

Larson refers to even more striking holdings in which, where the circumstances themselves are persuasive enough, the courts have allowed conclusions to stand which are supported by no medical testimony and which are in defiance of the medical testimony to the contrary introduced during the trial of the case. In his explanation for the reasons for relaxing the rule as to the necessity for medical testimony in proceedings under the workmen's compensation laws of the various states, Larson, in Chapter 79.53, page 302, of his work, states:

"In arriving at this rule, two underlying reasons may be discerned: the first is that lay testimony, including that of claimant himself, is of probative value in establishing such simple matters as the existence and location of pain, the sequence of events, leading to the compensable condition, and the actual ability or inability of claimant to perform his work; the second is that industrial commissions generally become expert in analyzing certain uncomplicated kinds of medical facts, particularly those bearing on industrial causation, disability, malingering and the like."

In continuing his discussion of the problem, Larson, in the following chapter of his work, points out that when the medical question is no longer an uncomplicated one and carries the fact-finders into realms which are properly within the province of medical experts, then reliance on lay testimony and "administrative *expertise*" is not justified. In such cases, he expresses the opinion that the courts should and do require expert medical testimony in order to support a finding of causal connection between the supposed accidental injury and the resulting disability or disease. It should be noted that in the Rhode Island case mentioned above, the claim was not made that the condition was cancer. The plaintiff never tried to identify the condition but merely said that it resulted from the accident and required surgery for its correction. Had the claim been made that the condition was cancer, it might have required medical proof and a different result possibly could have been reached. Fortunately, in our own jurisdiction (Texas), we have a trial de novo in compensation cases and the courts have required medical proof in those instances where the medical question is complicated. Certainly all would agree that the question of the cause of cancer is a complicated medical question.

From what has been said above, it is felt that the problems of handling this type of litigation in compensation cases is somewhat different and perhaps more difficult than is true in common-law actions. At the same time, every effort should be made to see that decisions in the two fields are not confused and that attorneys defending these cases thoroughly understand the reasons why different results may be reached under the same set of facts or approximately the same set of facts, depending upon whether or not the case is before an industrial commission or before a judge and jury in a common-law action. Compensation statutes carry a rule of liberal construction and the commissions and courts have followed this line of thinking in arriving at their results.

Insofar as the so-called "administrative *expertise*" referred to by Larson, there is considerable difference between the members of an industrial commission and civil jurors. The commissioners hear many of these cases every year and, therefore, become familiar with the minimal criteria and presumably are capable of judging when the proof is sufficient to warrant a consideration of causal connection. The average civil juror may never have served on a jury before in his life and certainly the odds are against prior service in a case involving the causal connection between trauma and cancer.

Conclusions

Thorough defensive preparation is essential. A positive medical defense should be developed. The plaintiff must be made to sustain the burden of proof in accordance with the rules of the trial forum. Regardless of whether the claim is causation of primary cancer or aggravation, each individual case must be tested carefully and scientifically against recognized *minimal* criteria. Evidence of *bridging symptoms* should be met squarely. Workmen's compensation decisions should be distinguished.

Members and Guests Attending the 1957 Convention and Members' Home Address

Abramson, Marcus, 315 E. 206th St., New York, 67, N. Y.

Adams, Charles J., 1783 Albany Ave., Hartford 5, Conn.

Ahlers, Mr. and Mrs. Paul F. (Amirrette), 520 42nd St., Des Moines, Ia.

Albert, Mr. and Mrs. Milton A. (Helen), 605 Dunkirk Rd., Baltimore 12, Md.

Alexander, Mr. and Mrs. Robert C. (Carol), son, Jack, and daughters, Robin and Karen, 14 W. Dixon Ave., Dayton 9, Ohio.

Allen, Bibb, 504 Windsor Dr., Birmingham 5, Ala.

Allen, Mr. and Mrs. James P., Jr. (Evelyn), 42 Thackeray Rd., Wellesley Hills 82, Mass.
Allman, Dr. and Mrs. David B. (Katherine), Atlantic City, N. J.
Altman, Hon. Joseph, Atlantic City, N. J.
Amdursky, Mr. and Mrs. Leonard H. (Sonya), 2649 E. Genesee St., Syracuse, N. Y.
Anderson, D. C., 1889 Clifton Ave., Highland Park, Ill.
Anderson, Mr. and Mrs. John H., Jr. (Snow), and daughter, Gray, 2209 White Oak Rd., Raleigh, N. C.
Anderson, Mr. and Mrs. Newton E. (Ada Mae), 6191 Barrows Dr., Los Angeles 48, Calif.
Anderson, Mr. and Mrs. Wilson (Margaret), 1600 Loudon Heights Rd., Charleston 4, W. Va.
Andrae, Mr. and Mrs. Henry (Helen), 1112 Vineyard Sq., Jefferson City, Mo.
Armstrong, Vayne M., 415 E. 45th St., Indianapolis 5, Ind.
Arnett, Mr. and Mrs. Foster D. (Jean), 4636 Alta Vista Way, S.W., Knoxville, Tenn.
Arnold, Mr. and Mrs. H. Bartley (Mary Jane), 9351 Harlem Rd., Rt. 3, Waterville, Ohio
Arnold, Mr. and Mrs. W. H. (Lucy), 1732 N. Main St., Greenville, S. C.
Atkins, Mr. and Mrs. C. Clyde (Esther), 2040 Country Club Prado, Coral Gables, Fla.
Baile, Mr. and Mrs. Harold Scott (Helen), 114 Kershaw Rd., Wallingford, Pa.
Baker, E. Ballard, 4602 Stuart Ave., Richmond, Va.
Baker, Mr. and Mrs. J. W. (Rose), 3845 Glenfield Dr., S.W., Knoxville, Tenn.
Baker, Mr. and Mrs. Sam Rice (Mary Lou), 600 S. Perry St., Montgomery, Ala.
Barker, Mr. and Mrs. Howard G. (Bernice), 3618 Suffolk Dr., Fort Worth 9, Texas
Barnard, Mr. and Mrs. Herbert E. (Jane), 520 East Dr., University City 24, Mo.
Barry, Mr. and Mrs. Hamlet J., Jr. (Gertrude), 7070 E. 11th Ave., Denver, Colo.
Bateman, Mr. and Mrs. Arthur T. (Margaret) 2611 S. W. 156th, Seattle 66, Wash.
Bateman, Mr. and Mrs. Harold A. (Anita), 3541 Hanover, Dallas 25, Texas.
Baylor, F. B., 2736 VanDorn St., Lincoln, Neb.
Beam, Mr. and Mrs. Paul E. (Mary), 3939 Washington Blvd., Indianapolis 5, Ind.
Belden, Mr. and Mrs. H. Reginald (Irene), son, Reg, and daughter, Marcia, R. D. 6, Box 219, Greensburg, Pa.
Bell, Mr. and Mrs. J. Hallman (Kate), Annandale Park, Cleveland, Tenn.
Belsan, Mr. and Mrs. Charles (Mildred), 91 Mansfield Ave., Shelby, Ohio.
Benton, Mr. and Mrs. Jesse W., Jr. (Mary), 2 Garden Pl., Chatham, N. J.
Berman, Mr. and Mrs. Emile Zola (Alice Rose), son, Eli, and daughter, Eliza, 22 Schoolhouse Lane, Roslyn Heights, N. Y.
Berson, Mr. and Mrs. William McHardy (Audrey), 73 Interlaken Rd., Orlando, Fla.
Betts, Mr. and Mrs. Forrest A. (Velle), 7524 Mulholland Dr., Los Angeles 46, Calif.
Bishop, Mr. and Mrs. Richard S. (Rosemary), 25 Hilltop Dr., San Carlos, Calif.
Bisselle, Mr. and Mrs. Morgan F. (Lucille), 49 Arlington Terr., Utica 3, N. Y.
Blanchet, Mr. and Mrs. G. Arthur (Lucille), 107 Kensington Ave., Jersey City 4, N. J.
Bolton, Mr. and Mrs. John S. (Elsie), 1460 Queens Rd., Los Angeles 46, Calif.
Bowers, Mr. and Mrs. Charles W. (Betty), 244 Spencer St., Glendale, Calif.
Bradford, Mr. and Mrs. A. Lee (Vivienne), 1260 Mendavia Ave., Coral Gables, Fla.
Bradish, Mr. and Mrs. Philip L. (Lillian), 1345 Green Lane, La Canada, Calif.
Breeden, Edward L., Jr., 1301 Harmott Ave., Norfolk, Va.
Brown, Mr. and Mrs. George H. (Grace), 28 Reservoir Pl., Belleville, N. J.
Bulman, Mr. and Mrs. James C. (Marian), 10 Hall St., East Greenwich, R. I.
Burke, Mr. and Mrs. Patrick F. (Mary), 29 Fenwood Dr., Old Saybrook, Conn.
Burnett, Mr. and Mrs. Henry (Florence), 385 Woodcrest Rd., Key Biscayne, Fla.
Burns, Mr. and Mrs. Lawrence, Jr. (Elinor), and sons, Tim and David, Kensington Rd., Coshocton, Ohio.
Camp, Mr. and Mrs. George T. (Eleanor), 1930 Shady Lane, Beaumont, Texas.
Campbell, Paul Jr., 108 Watauga Lane, Lookout Mountain, Tenn.
Carey, L. J., 402 Lexington Rd., Grosse Pointe 36, Mich.
Carpenter, C. R., 631 Lake Ave., Wilmette, Ill.
Carriger, Mr. and Mrs. John S. (Helen), 100 West Brow Oval, Lookout Mountain, Tenn.
Carson, Mr. and Mrs. S. O. (Helen), 2269 S. W. 23rd St., Miami, Fla.
Carter, Mr. and Mrs. Lee M. (Alice), 225 Horseshoe Dr., Kirkwood, Mo.
Case, Donald L., 4506 Park Lane, Dallas, Texas.
Cassem, Mr. and Mrs. Edwin (Winifred), 615 N. 62nd St., Omaha, Neb.
Chappell, Mr. and Mrs. R. Harvey, Jr. (Ann), 5203 Lee Ave., Richmond, Va.
Chilcote, Mr. and Mrs. Sanford M. (Mildred), and son, San, Jr., 1190 Hulton Rd., Oakmont, Pa.
Christovich, Mr. and Mrs. Alvin R. (Elyria), 4155 Vendome, New Orleans, La.
Christovich, Mr. and Mrs. A. R., Jr. (Betty), 29 Hawk St., New Orleans, La.
Clayton, Mr. and Mrs. Erwin A. (Marie), 2740 S. W. 7th Pl., Golfview, Gainesville, Fla.
Clopton, Mr. and Mrs. Mort L. (Elizabeth), and son, Charles, 6239 N. Willard St., San Gabriel, Calif.
Coe, Mr. and Mrs. Vernon (Rosalind), sons, Bob and Edward, and daughter, Carol, 4113 Windsor Pkwy., Dallas, Texas.
Conner, Mr. and Mrs. Francis D. (Katharine), 13 Windsor Dr., Belleville, Ill.
Cook, Jo D., 159 Prospect, Seattle 9, Wash.
Cooney, Mr. and Mrs. William P., Jr. (Mary Catherine), son, Bill, and daughter, Kitty, 18034 Muirland, Detroit 21, Mich.
Cooper, Mr. and Mrs. Ben T. (Juliet), and daughter, Julie, 4022 Gilman Ave., Louisville 7, Ky.
Cope, Mr. and Mrs. Kenneth B. (Lela), 123 Santa Clara Dr., N. W., Canton 9, Ohio.
Corbin, Mr. and Mrs. David L. (Margaret), Anderson Rd., Greenwich, Conn.
Cowie, Mr. and Mrs. Elrick A. (Nell), Kenmore Rd., Bloomfield, Conn.
Cox, Mr. and Mrs. Taylor H. (Mabel), Chilhowee Ct. No. 14, Knoxville, Tenn.

Crabtree, Mrs. Charles E., Hopkinsville, Ky.
Creede, Frank J., 524 Post St., San Francisco, Calif.
Creede, Frank J., Jr., Fresno, Calif.
Crocker, Mr. and Mrs. Edward D. (Ida), 2971 Litchfield Rd., Shaker Heights 22, Ohio.
Crosby, Carlisle C., 68 Sharon Ave., Piedmont 11, Calif.
Cross, Mr. and Mrs. J. Harry (Anna), and son, John, 2707 Garrison Blvd., Baltimore 16, Md.
Crowell, Mr. and Mrs. Horace (Helen), New York, N. Y.
Crownover, Mr. and Mrs. Arthur, Jr. (Augusta), 2012 Cedar Lane, Nashville 12, Tenn.
Cull, Mr. and Mrs. Frank X. (Madeleine), 2200 Chatfield Dr., Cleveland Heights 6, Ohio
Curtin, Mr. and Mrs. Thomas P. (Alice), 776 S. Maple Ave., Glen Rock, N. J.
Cushman, Mr. and Mrs. Edward H. (Martha), 707 Chelten Ave., Philadelphia 26, Pa.
Dahinden, Blanche, Milwaukee, Wisconsin
Dautrich, Mr. and Mrs. John J. (Elizabeth), 110 Sunset Lane, Haverford, Pa.
Deak, Mr. and Mrs. William S. (Grace), Reading, Pa.
Dempsey, James, Crompond Rd., Peekskill, N. Y.
Devine, Mr. and Mrs. J. Murray (Clothilde), 629 N. River Rd., Manchester, N. H.
Devine, Maurice F., 1325 Union St., Manchester, N. H.
Devine, Mr. and Mrs. Peter J., Jr. (Mary), 504 Avondale Ave., Haddonfield, N. J.
Diehm, Mr. and Mrs. Ellis R. (Helen), 2830 Coleridge Rd., Cleveland Heights 18, Ohio.
Dimond, Mr. and Mrs. Herbert F. (Helen), 120 W. 183rd St., Bronx, N. Y.
Dixon, Mr. and Mrs. James A. (Ruth), 10585 N. E. 6th Ave., Miami 38, Fla.
Dodd, Mr. and Mrs. Lester P. (Edith), 19570 Shrewsbury Dr., Detroit 21, Mich.
Donaldson, Mr. and Mrs. Charles W. (Barbara), 1945 Ontario St., Windsor, Canada.
Duggan, Mr. and Mrs. Ben O., Jr. (Marion), and daughter, Barbara, 1846 Crestwood Dr., Chattanooga 5, Tenn.
Dunn, Evans, Abingdon, Rt. 13, Box 96, Birmingham, Ala.
Duvall, Duke, 1800 Drakestone, Oklahoma City, Okla.
Dykes, Mr. and Mrs. J. Ralph (Frances), 40-11 168th St., Flushing 58, N. Y.
Eidman, Mr. and Mrs. Kraft W. (Julia Mary), 2616 Pemberton, Houston 5, Texas.
Elam, Mr. and Mrs. John C. (Virginia), 337 Fallis Rd., Columbus 14, Ohio.
Ely, Robert C., 1108 North Dr., Kirkwood 22, Mo.
Enteman, Mr. and Mrs. Verling C. (Evelyn), 85 Washington St., East Orange, N. J.
Epps, Mr. and Mrs. A. C. (Rozanne), 1711 Park Ave., Richmond, Va.
Eshelman, Mr. and Mrs. Robert P. (Cecilia), 335 21st St., N.W., Canton 9, Ohio.
Farley, Dean and Mrs. Robert J. (Alice), University, Miss.
Faude, Mr. and Mrs. John P. (Helen), and daughter, Ann, Guilmartin Rd., West Hartford 7, Conn.
Fields, Mr. and Mrs. Ernest W. (Muriel), 36 Washington Ave., Chatham, N. J.
Fitz Patrick, Mr. and Mrs. William F. (Margaret), son, James, and daughter, Mary, 201 Croyden Rd., Syracuse, N. Y.
Fix, Mr. and Mrs. Meyer (Elizabeth), son, Brian, and daughter, Terry, 230 Cobbs Hill Dr., Rochester 10, N. Y.
Flick, Mr. and Mrs. Willis H. (Imogene), 685 Curtiswood Dr., Miami 49, Fla.
Fluty, Mr. and Mrs. Holly W. (Margaret), 5 Putnam Hill, Greenwich, Conn.
Flynn, James F., P. O. Box 900, Sandusky, Ohio.
Folts, Aubrey F., and daughter, Carole, 624 East Brow Rd., Lookout Mountain, Tenn.
Ford, Mr. and Mrs. Ralph H. (Joan), and sons, John and Bobby, 10 Westside Sq., Huntsville, Ala.
Fraizer, Mr. and Mrs. C. C. (Nelle), 2720 VanDorn St., Lincoln, Neb.
Franklin, James A., Jr., 3409 Avocado Dr., Fort Myers, Fla.
Fredericks, Mr. and Mrs. Alanson R. (Gertrude) and daughters, Sian and Kerry, 12 Deacon Hill Rd., Stamford, Conn.
Freeston, Mr. and Mrs. H. R. (Alice), Newark, N. J.
Galiher, Mr. and Mrs. Richard W. (Phyllis), son Richard, and daughters, Phyllis, Patricia and Kathleen, 5816 Highland Dr., Kenwood, Md.
Gallagher, Mr. and Mrs. Donald (Rosemary), 488 Kenwood Ave., Delmar, N. Y.
Gallagher, Michael R., 8823 Lynnhaven Dr., Parma Heights 30, Ohio.
Gardere, Mr. and Mrs. George P. (Mary Olive), 10265 Inwood Rd., Dallas, Texas.
Garfield, Mr. and Mrs. Frederick M. (Olive), 34 Gramercy Park East, New York, N. Y.
Garrett, Mr. and Mrs. James W. (Margaret), 2072 Myrtlewood Dr., Montgomery, Ala.
Geer, Mr. and Mrs. Arthur B. (Marie), 5508 Schaeffer Rd., Minneapolis 2, Minn.
Gentry, Mr. and Mrs. Fred B. (Dorothy), son, Bing, and daughter, Alice, 2515 Stanley Ave., S. E., Roanoke, Va.
Gillen, Mr. and Mrs. William A. (Lillian), 2629 Prospect Rd., Tampa 9, Fla.
Gist, Howard B., 2009 Polk St., Alexandria, La.
Glos, R. Corbin, 3310 Lykes Ave., Tampa 6, Fla.
Gongwer, Mr. and Mrs. J. H. (Gladys), 606 Andover Rd., Mansfield, Ohio.
Gooch, Mr. and Mrs. J. A. (Adrienne), 4400 Ridgehaven Ct., Fort Worth 16, Texas.
Goodwin, Mr. and Mrs. John M. (Sue), 460 Edgewood, Clayton 5, Mo.
Gould, Mr. and Mrs. Charles P. (Mary), 1200 Old Mill, San Marino, Calif.
Gouldin, Mr. and Mrs. Paul C. (Virginia), sons, Dave and Kip, and daughters, Penny and Judy, R. D. No. 2, Bunn Hill Rd., Binghamton, N. Y.
Gowan, Mr. and Mrs. Allan P. (Mary), P. O. Box 528, Lake George, N. Y.
Graham, Mr. and Mrs. John C. (Elizabeth), 11 Colony Rd., West Hartford 5, Conn.
Gray, Richard E., 6715 Desco Dr., Dallas 15, Texas.
Gray, Mr. and Mrs. William, L., Jr. (Jean), 600 Alhambra Circle, Coral Gables 34, Fla.
Griffin, Mr. and Mrs. Joseph W. (Kae), 548 Cherry St., Winnetka, Ill.
Grissom, Pinkney, 4204 Stanhope St., Dallas 5, Texas.
Groezinger, Mr. and Mrs. Leland B. (Clara-Catherine), 2701 Broderick St., San Francisco 23, Calif.
Hainline, Mr. and Mrs. Theodore R. (Jane), Fort Lauderdale, Fla.

Hamilton, John S., Jr., 121 E. Cuttriss Pl., Park Ridge, Ill.
Hanson, Mr. and Mrs. Rex. J. (Katherine), 1807 Millcreek Way, Salt Lake City, Utah.
Hardin, Mr. and Mrs. Calvin E., Jr. (Bulah), 2579 E. Lakeshore Dr., Baton Rouge 6, La.
Harrison, Mr. and Mrs. Baya M., Jr. (Virginia), son, Baya, and daughter, Ginger, 646 17th Ave., N. E., St. Petersburg, Fla.
Hassett, Mr. and Mrs. Paul M. (Dorothy), 383 Parker Ave., Buffalo 16, N. Y.
Hassett, Mr. and Mrs. William D. (Bernadine), 475 Woodward Ave., Buffalo 14, N. Y.
Haugh, Mr. and Mrs. James T. (Eleanor), Rutland, Vt.
Hayes, Mr. and Mrs. Gerald P. (Eilleen), and son, Michael, 1869 N. 68th St., Wauwatosa 13, Wis.
Head, Mr. and Mrs. Joseph, Jr. (Anne), 2228 Pine St., Philadelphia 3, Pa.
Head, Walton O., 4215 Lakeside Dr., Dallas 19, Texas.
Heafey, Edwin A., 275 Sea View Ave., Piedmont, Calif.
Hebdon, Mr. and Mrs. Jack (Anne), 127 Ivy Lane, San Antonio, Texas.
Heft, Mr. and Mrs. Carroll R. (Arleen), 3040 Michigan Blvd., Racine, Wis.
Heneghan, George E., 7119 Maryland Ave., University City 5, Mo.
Hershey, Mr. and Mrs. Richard G. (Charlotte), 1015 W. Market, Taylorville, Ill.
Hewitt, Adrian T., 46 Hamilton Ave., Ottawa, Canada.
Hinslea, Mr. and Mrs. Lee C. (Adah), 11209 Lake Ave., Cleveland 2, Ohio.
Hobson, Robert C., 411 Mayfair Lane, Louisville 7, Ky.
Hocker, Mr. and Mrs. Lon (Esther), son, Lonny, and daughter, Priscilla, 7637 Shirley Dr., Clayton, Mo.
Hoffstot, Mr. and Mrs. W. H. (Susan), 619 W. 67th St., Kansas City, Mo.
Horn, Mr. and Mrs. Clinton M. (Mabel), 2940 Montgomery Rd., Shaker Heights 22, Ohio.
Horn, Herbert, 8 S. Dorset, Ventnor, N. J.
Howard, James A., 1435 Hadlock Ave., Norfolk, Va.
Hubbard, Mr. and Mrs. Reese (Virginia), 627 S. Lincoln Lane, Arlington Heights, Ill.
Hudgins, Paul S., Cumberland Rd., Bluefield, W. Va.
Humkey, Mr. and Mrs. Walter (Rosemary), 1539 Catalonia Ave., Coral Gables, Fla.
Hurd, Frank, 17712 Edgewater Dr., Lakewood, Ohio.
Jacobs, Mr. and Mrs. Wyatt (Elizabeth), 153 Michigan Ave., Highwood, Ill.
James, Harry M., 5989 N. Cuba Ct., St. Louis 9, Mo.
Janata, Mr. and Mrs. Rudolph, Jr. (Mary Jean), 2225 Cambridge Blvd., Columbus 21, Ohio.
Jennings, Mr. and Mrs. Alston (Dorothy), Rt. 5, Box 335, Little Rock, Ark.
Joanis, John W., 430 Ellis St., Stevens Point, Wis.
Johnson, Mr. and Mrs. F. Carter, Jr. (Jo), 7637 Jeannette St., New Orleans 18, La.
Jones, Edwin D., Jr., 2623 Cherry, San Jose, Calif.
Jones, Mr. and Mrs. William J. (Mary), 18819 Warwirk Rd., Birmingham, Mich.
Jordan, Mr. and Mrs. Welch (Marietta), and daughter, Martha, 1514 Kirkpatrick Pl., Greensboro, N. C.
Junkerman, Mr. and Mrs. William J. (Helen), 2475 Palisade Ave., Riverdale 63, N. Y.
Kalven, Prof. and Mrs. Harry, Jr. (Betty), and son, Jamie, Chicago, Ill.
Karr, Mr. and Mrs. Payne (Susan), 2647 Cascadia, Seattle 44, Wash.
Kelly, Mr. and Mrs. Edward J. (Mary), 5309 Harwood Dr., Des Moines, Ia.
Kelly, Mr. and Mrs. T. Paine, Jr. (Jean), and daughter, Carla, 1021 Frankland Rd., Tampa, Fla.
Kienzle, Mr. and Mrs. Malcolm M. (Marian), son, Scotty, and daughter, Nancy, 1121 Western S.W., Canton 10, Ohio.
Kimbrell, Mr. and Mrs. Charles A. (Esther), 4809 Alhambra Circle, Coral Gables, Fla.
King, Mr. and Mrs. Robert E. (Travis), 7213 St. Andrews Dr., Bakersfield, Calif.
Kisselman, Mr. and Mrs. Carl (Eleanor), Camden, N. J.
Klein, Mr. and Mrs. Daniel E. (Elizabeth), Roland Park Apts., Apt. K-1, Baltimore 10, Md.
Kluwin, Mr. and Mrs. John A. (Noreta), and sons, Bill, Tom and Mike, 5346 N. Santa Monica Blvd., Milwaukee 17, Wis.
Knapp, Mr. and Mrs. Frank J. (Inez), 20 Huntley Dr., Houston, Texas.
Knepper, Mr. and Mrs. William E. (Lucille), son, Dick, and daughter, Bonne, 3945 Kioka Ave., Columbus 21, Ohio.
Knipmeyer, Lowell L., 612 W. 50th St., Kansas City, Mo.
Korsan, Mr. and Mrs. Peter J. (Dorothy), 327 Callender Lane, Wallingford, Pa.
LaBrum, J. Harry, 1830 N. 69th St., Philadelphia 31, Pa.
Lacey, Mr. and Mrs. Robert B. (Belva), 15705 Rosemont, Detroit 23, Mich.
Lacoste, Mr. and Mrs. Roger (Marcelle), and daughter, Justine, 68 Elmwood Ave., Outremont, Montreal, Canada.
Lancaster, Mrs. J. L. (Pat), Dallas, Texas.
LeCorgne, Robert E., Jr., 5521 S. Miro St., New Orleans, La.
Levin, Samuel, 1300 N. State St., Chicago, Ill.
Lindberg, Mr. and Mrs. H. Richard (Jean), R. D. No. 1, Keene, N. H.
Lindsey, Mr. and Mrs. Robert S. (Grace), 212 Normandy Rd., Little Rock, Ark.
Lloyd, Mr. and Mrs. L. Duncan (Olivia), and daughter, Kay, 537 Jackson Ave., Glencoe, Ill.
Lokey, Hamilton, 737 Woodward Way, N.W., Atlanta, Ga.
Long, Stanley B., 1157 Harvard Ave. No., Seattle 2, Wash.
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Mack, Mr. and Mrs. H. Pitts (Mary-Louise), and daughters, Virginia and Patricia, 869 Rosecrans St., San Diego 6, Calif.
Manier, Mr. and Mrs. Miller (Ada), 913 E. Clayton Ave., Nashville, Tenn.
Marks, Sumter D., Jr., 5421 S. Miro St., New Orleans, La.
Marryott, Mr. and Mrs. Franklin J. (Stephanie), 34 White Oak Rd., Wellesley Hills, Mass.

Marsalek, Mr. and Mrs. G. W. (Clara), 350 N. Woodlawn, Kirkwood 22, Mo.
Marshall, Mr. and Mrs. Francis E. (Love), 304 Mallwyd Rd., Merion Station, Pa.
Martin, Mr. and Mrs. Burkett H. (Dorothy), 353 Marian Lane, Vicksburg, Miss.
Martin, Mr. and Mrs. John B. (Esther), 9130 Green Tree Rd., Philadelphia 18, Pa.
Martin, Mr. and Mrs. William F. (Catherine), 200 E. 66th St., New York, N. Y.
Masters, Mr. and Mrs. Richard C. (Vera), 2418 Indian Hills Dr., Okemos, Mich.
Matthews, Mr. and Mrs. John R., Jr. (Caroline), 110 S. Haardt Dr., Montgomery, Ala.
Mayer, Frances, New York, N. Y.
Mayne, Mr. and Mrs. Wiley E. (Elizabeth), sons, Wiley, Jr., and John, and daughter, Martha, 712 18th St., Sioux City, Ia.
Merrick, Ivan V., Kansas City, Mo.
Miley, Mr. and Mrs. Mortimer B. (Beatrice), 2507 Beverly Rd., St. Paul, Minn.
Miller, Mr. and Mrs. Orrin (Margaret Alice), 3724 Potomac, Dallas 5, Texas.
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Moelmann, Mr. and Mrs. John M. (Harriet), 744 Keystone Ave., River Forest, Ill.
Montgomery, Richard B., 265 Audubon Blvd., New Orleans 25, La.
Moody, Mr. and Mrs. Denman (Ted), and son, Denny, 2122 Chilton, Houston 19, Texas.
Moore, Alvin O., 101 Eastview, Lookout Mountain, Tenn.
Moore, Raymond J., and son, Gary, 1615 E. Cumberland Blvd., Whitefish Bay, Wis.
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Mordaunt, Mr. and Mrs. John H. (Dorothy), 4828 Ewing Ave. So., Minneapolis 10, Minn.
Morgan, Mr. and Mrs. Alfred J., Jr. (Blair), and son, Richard, 17 Kent Rd., Scarsdale, N. Y.
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Moss, Mr. and Mrs. Sidney A. (May), 435 S. Rossmore Ave., Los Angeles 5, Calif.
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Mullally, Lawrence E., 677 Longridge Rd., Oakland, Calif.
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McCullen, Mr. and Mrs. W. A. (Ardis), and daughters, Mary Stewart and Kathleen, 1121 St. Cloud St., Rapid City, S. D.
McDonald, Mr. and Mrs. W. Percy (Lily May), 1233 Peabody Ave., Memphis, Tenn.
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McKay, Mr. and Mrs. John G., Jr. (Betty Jean), 1300 Blue Rd., Coral Gables, Fla.
McKesson, Mr. and Mrs. Theodore G. (Ruth), 9 E. Country Club Dr., Phoenix, Ariz.
McLoughlin, James J., Park Drive So., Westchester Country Club Grounds, Rye, N. Y.
McNamara, Mr. and Mrs. J. Paul (Mary), 2130 Cheshire Rd., Columbus, Ohio.
McNeal, Harley J., 26828 Lake Rd., Bay Village, Ohio.
Nall, A. Walton, 4803 Lawrenceville Hwy., Tucker, Ga.
Nelson, Mr. and Mrs. P. H. (Elizabeth), 306 Southwood Rd., Columbia, S. C.
Nigh, Mr. and Mrs. Warren (Jennie May), and daughters, Jean Hope and Louise, 3306 Winnett Rd., Chevy Chase, Md.
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O'Bryan, Mr. and Mrs. William M. (Jeane), and daughter, Donna, 707 N. E. 26th Ave., Fort Lauderdale, Fla.
O'Kelley, Mr. and Mrs. A. Frank (Louise), and son, Bob, 851 Circle Dr., Tallahassee, Fla.
O'Mara, Mr. and Mrs. Junior (Mary Jane), son, Jimmy, and daughter, Jane, 4134 Hawthorne Dr., Jackson, Miss.
O'Neill, Mr. and Mrs. Edward T. (Margaret), son, Joe, and daughter, Kathleen, 450 S. Part Ave., Fond du Lac, Wis.
Orlando, Mr. and Mrs. Samuel P. (Elsie), 111 Upland Way, Haddonfield, N. J.
O'Rourke, Vincent F., New York, N. Y.
O'Shea, Mr. and Mrs. James C. (Kathleen), sons, Kevin, Brian and Brendan, and daughter, Katie, 911 N. George St., Rome, N. Y.
Ossman, Madeline, New York, N. Y.
Paine, Mr. and Mrs. James C. (Ruth), 127 Miramar Way, West Palm Beach, Fla.
Parker, Mr. and Mrs. William D. (Inez), 5 Mayfair Pl., Hamilton, Canada.
Peckinpaugh, Mr. and Mrs. Charles W., Jr. (Cherie), 2905 Meadowwood, Toledo 6, Ohio.
Perabo, Mr. and Mrs. Fred W. (Victoria), Warren Township, N. J.
Phelan, Mr. and Mrs. Roderick G. (Eleanor), son, Roderick, and daughter, Gaylanne, 641 Spadina Rd., Toronto, Canada.
Phelan, Thomas N., 300 Russell Hill Rd., Toronto, Canada.
Phillips, Mr. and Mrs. Thomas M. (Edna), 3818 Wickersham Dr., Houston, Texas.
Pledger, Mr. and Mrs. Charles E., Jr. (Beryle), and daughters, Lee and Lacy, 5175 Tilden St., N.W., Washington 16, D. C.
Plunkett, Mr. and Mrs. Robert E. (Anne), 4200 Kensington, Detroit 24, Mich.
Popper, Joseph W., 3185 Vista Circle, Macon, Ga.
Power, John F., 1933 Balmoral Ave., Westchester, Ill.
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Py, Mr. and Mrs. John R. (Miriam), 212 44th St., Sandusky, Ohio.

Quick, Mr. and Mrs. W. Edward (Terry), 120 N. Perkins Rd., Memphis, Tenn.
Rankin, James K., daughter, Susannah, and guest, Deborah Bell, 111 Brighton Rd., N.W., Atlanta, Ga.
Reath, Henry T., 7708 Navajo St., Chestnut Hill, Philadelphia 18, Pa.
Reed, Mr. and Mrs. Warren G. (Helen Clare), 20 Manitoba Rd., Waban 68, Mass.
Reese, Mr. and Mrs. W. Ford (Beverly), 5830 Pitt St., New Orleans, La.
Rhodes, Mr. and Mrs. Howard W., Jr. (Ruth), 4017 Longfellow St., Lynchburg, Va.
Rice, Mr. and Mrs. H. Eliot (Margery), 75 Friendly Rd., Cranston 10, R. I.
Richeson, Hugh E., 213 S. Tyrone Rd., Baltimore 12, Md.
Riepe, Carl C., 1306 Madison Ave., Burlington, Ia.
Ris, Mr. and Mrs. William K. (Patty), 2058 Ivanhoe St., Denver 7, Colo.
Robinson, Mr. and Mrs. Hamilton A. (Mary Emma), and sons, Gary and Bruce, 160 Mohawk Dr., Pittsburgh 28, Pa.
Robinson, Mr. and Mrs. Nelson E. (Genevieve), and daughter, Susan, 17 Allendale Rd., Binghamton, N. Y.
Rogers, Remington, 1808 E. 16th Pl., Tulsa, Okla.
Rooney, Mr. and Mrs. Robert O. (June), Chicago, Ill.
Ross, Mr. and Mrs. Walter W., Jr. (Margaret), 320 N. Mayflower Rd., Lake Forest, Ill.
Rowe, Mr. and Mrs. Royce G. (Marie), 1356 Ashland Ave., Wilmette, Ill.
Rowe, Mr. and Mrs. Royce G., Jr. (Kathryn), Chicago, Ill.
Royster, John H., and daughter, Nancy, 4831 Grand View Dr., Peoria, Ill.
Rudolph, Mr. and Mrs. Harold W. (Phyllis), and daughter, Stella, Rosebrook Rd., New Canaan, Conn.
Runals, Mr. and Mrs. Clarence R. (Edith), Lewiston Heights, Lewiston, N. Y.
Russell, Mrs. Gordon (Mary Joyce), Toronto, Canada.
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Ryan, Lewis C., South Gate Rd., Fayetteville, N. Y.
Sanders, Mr. and Mrs. Wilson (Helen), 1860 Fawsett Rd., Winter Park, Fla.
Saunders, Edward, San Francisco, Calif.
Schell, Mr. and Mrs. Walter O. (Bibian), 232 S. Windsor Blvd., Los Angeles 4, Calif.
Schipfer, Mr. and Mrs. Daniel C. (Betty), Cleveland, Ohio.
Schlotthauer, Mr. and Mrs. George McD. (Elizabeth), son, George, and daughter, Jane, 1177 Farwell Dr., Madison 4, Wis.
Schneider, Philip J., 7200 Drake Rd., Cincinnati 2, Ohio.
Scholtka, Marion E., Milwaukee, Wis.
Schroeder, Mr. and Mrs. Laurence A. (Elizabeth), 5004 Alhambra Circle, Coral Gables, Fla.
Schumacher, Mr. and Mrs. Carl J., Jr. (Leila), 4614 Perrier St., New Orleans, La.
Searl, Mr. and Mrs. Jerome H. (Elizabeth), daughter, Judy, Highbridge Rd., Fayetteville, N. Y.
Sedgwick, Wallace E., 3390 Reliez Highland, Lafayette, Calif.
Sessions, Cicero C., 1609 Frankfort St., New Orleans 22, La.
Shannon, Mr. and Mrs. George T. (Tommie), 3007 Villa Rosa, Tampa, Fla.
Shereff, Mr. and Mrs. Jay (Eleanor), 95 Washington St., East Orange, N. J.
Shirley, Mr. and Mrs. Preston (Betty), and daughters, Carolyn and Sarah, 4602 Sherman, Galveston, Texas.
Skipworth, Mr. and Mrs. Robert T. (Connie), Rochester, N. Y.
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Smith, Mr. and Mrs. Herschel E. (Margaret), 1259 Alhambra Circle, Coral Gables 34, Fla.
Smith, J. Kirby, 4212 Shenandoah, Dallas, Texas.
Smith, Mr. and Mrs. William P. (Elizabeth), 5806 Kenmore, Chicago 40, Ill.
Snow, Mr. and Mrs. C. B. (Dorothy), 862 Avondale, Jackson 5, Miss.
Snow, Gordon H., 355 Flintridge Oaks Dr., Pasadena, Calif.
Stallings, Mr. and Mrs. Norman (Mary), 1904 Holly Lane, Tampa, Fla.
Steele, Mr. and Mrs. Walter A. (Patricia), 940 Detroit St., Denver, Colo.
Stephens, Mr. and Mrs. Jerry O. (Ellen), Youngstown, Ohio.
Stephens, Mr. and Mrs. Oscar A. (Alice), R.D. No. 2, Mellinger Rd., Canfield, Ohio.
Stetler, C. Joseph, Chicago, Ill.
Stichter, Mr. and Mrs. Wayne (Irene), 4129 Overlook Blvd., Toledo, Ohio.
Strasburger, Mr. and Mrs. H. W. (June), 3500 Rock Creek Dr., Dallas, Texas.
Stripp, Douglas, 808 Huntington Rd., Kansas City 13, Mo.
Stubbs, Don, Kansas City, Mo.
Stubbs, Tom J., 6108 Morningside Dr., Kansas City, Mo.
Suddath, Mr. and Mrs. William E., Jr. (Vernon), 703 Chickasaw St., Jackson, Miss.
Sullivan, Mr. and Mrs. Thomas W. (Janet), 130 Elmcroft Rd., Rochester 9, N. Y.
Sweitzer, J. Mearl, 1012 Tenth St., Wausau, Wis.
Thomas, Earl T., Jackson, Miss.
Thomas, Mr. and Mrs. John W. (June), 1819 Seneca, Columbia, S. C.
Thornbury, Mr. and Mrs. P. L. (Gertrude), 1810 Northwest Ct., Columbus, Ohio.
Thornbury, Mr. and Mrs. Thomas G. (Cindy), Columbus, Ohio.
Thornton, Mr. and Mrs. John H., Jr. (Betty), 3286 Avenham Ave., Roanoke, Va.
Tinkham, Mr. and Mrs. Richard P. (Helen), son, Tommy, and daughter, Nancy, 910 13th St., Wausau, Wis.
Topping, Mr. and Mrs. Price H. (Barbara), 32 Carleon Ave., Larchmont, N. Y.
Tressler, Mr. and Mrs. David L. (Jessie Adele), and son, David, 1111 Walnut St., Western Springs, Ill.
Tucker, Mr. and Mrs. R. Carter (Irene), 511 W. Meyer, Kansas City, Mo.

Tucker, Warren C., 29 Beverly Pl., Utica, N. Y.
Ulrich, Mr. and Mrs. Leslie R. (Ruth), 20044 Frazier Dr., Rocky River 16, Ohio.
Underwood, Edwin H., Jr., 785 Woodcrest Rd., Key Biscayne, Fla.
Underwood, Mr. and Mrs. J. Toll (Martha), and daughter, Susan, 2409 Locke Lane, Houston, Texas.
Van Orman, Mr. and Mrs. Francis (Elizabeth), 83 Old Short Hills Rd., Short Hills, N. J.
Vandeveer, Mr. and Mrs. Leroy G. (Isabel), Box 143, 5675 Sussex Rd., Bloomfield Hills, Mich.
Velpmen, Howard C., 4144 11th Ave., Los Angeles 8, Calif.
Waechter, Mr. and Mrs. Arthur J., Jr. (Peggy), 1210 Webster St., New Orleans 18, La.
Wagner, Mr. and Mrs. Paul (Norma), 1101 Olive St., Belleville, Ill.
Waller, Mr. and Mrs. Thomas S. (Lucille), 3243 Madison, Paducah, Ky.
Ward, Charles S., 10001 Crestwood Rd., Kensington, Md.
Warder, Mr. and Mrs. Smith (Betty), 14406 Drexmore Rd., Shaker Heights 20, Ohio.
Warren, Mr. and Mrs. Theodore E. (Ada), 4419 Shore Drive Country Club, Ashtabula, Ohio.
Wassell, Thomas W., 4702 Melissa Lane, Dallas 29, Texas.
Waters, Mr. and Mrs. William W. (Elizabeth), and son, Tony, 2261 Norwic Pl., Altadena, Calif.
Weichelt, George M., 2020 Lee Ave., Tallahassee, Fla.
Weis, Mr. and Mrs. Joseph F. (Mary), 3218 Perrysville Ave., Pittsburgh 14, Pa.
Weis, Joseph F., Jr., 3218 Perrysville Ave., Pittsburgh 14, Pa.
Wells, Mr. and Mrs. Erskine W. (Nell), 1630 Howard St., Jackson, Miss.
Wells, Mr. and Mrs. Troward G. (Flora), 216 Jacob Dr., Pittsburgh 35, Pa.
Wesner, Fred F., Sedalia, Mo.
Weston, S. Burns, 2675 Cranlyn Rd., Shaker Heights 22, Ohio.
Weston, Mr. and Mrs. T. Benjamin (Mary), 136 Boone Trail, Severna Park, Md.
Whaley, Mr. and Mrs. Thomas B. (Katharine), and daughters, Trina and Helen, 2419 Heyward St., Columbia, S. C.
White, Mr. and Mrs. Harvey E. (Mabel), 3901 Beach Ave., Norfolk, Va.
White, Mr. and Mrs. J. Olin (Ann), Hickory Valley Rd., Nashville, Tenn.
White, Mr. and Mrs. Jacob S. (Emily), 3707 N. Delaware St., Indianapolis, Ind.
White, Thomas Raeburn, Jr., Morris Rd., Penllyn, Pa.
Whitehead, Mr. and Mrs. George I., Jr. (Phyllis), 20 Nursery Rd., Huntington Station, L. I., N.Y.
Whitlow, Mr. and Mrs. Henry O. (Bette), Paducah, Ky.
Wick, Mr. and Mrs. William A. (Lucy), 7102 N. Pennsylvania St., Indianapolis 20, Ind.
Wicker, John J., Jr., 1033 Riverside Dr., Richmond, Va.
Wickham, Mr. and Mrs. William A. (Marion), and daughters, Janet and Sally, 16708 Huntington Rd., Detroit 19, Mich.
Wickhem, Mr. and Mrs. John C. (Mary), 2323 Linden Ave., Janesville, Wis.
Williams, Mr. and Mrs. John C. (Pearl), Houston, Texas.
Williams, Mr. and Mrs. Marvin, Jr. (Elsie), 2 Woodhill Rd., Birmingham, Ala.
Williams, Mr. and Mrs. Reginald L. (Helen), and son, Richard, 4500 San Amaro Dr., Coral Gables 46, Fla.
Williams, Mr. and Mrs. Richard L. (Eugenia), Box 308, Bon Air, Va.
Willson, Mr. and Mrs. Jack N. (Estelle), 5049 Wateka, Dallas, Texas.
Wilson, Gill Robb, New York, N. Y.
Winkler, Mr. and Mrs. John H. (Emma), 120 Jefferson Ave., Valhalla, N. Y.
Wise, Mr. and Mrs. William G. (Grace), New York, N. Y.
Woodhead, Mr. and Mrs. Frank W. (Mary), 470 S. Santa Anita Ave., Pasadena 10, Calif.
Wright, Mr. and Mrs. Clyde H. (Mary), 203 18th St., N.W., Canton 3, Ohio.
Yancey, Mr. and Mrs. George W. (Martha), 15 Glen Iris Pk., Birmingham 5, Ala.
Yates, Mr. and Mrs. Tom L. (Lyleth), and daughters, Mary Susan and Nancy Ann, 1120 Seneca Rd., Wilmette, Ill.
Yegge, Ronald V., 434 Dahlia, Denver 20, Colo.
Young, Frank M., 3544 Altamount Rd., Birmingham, Ala.
Young, Mr. and Mrs. William K. (Mary), 516 S. Norton Ave., Los Angeles 5, Calif.
Zink, William S., 123 Windsor Ave., Haddonfield, N. J.
Zucker, Mr. and Mrs. Saul J. (Alice), 329 Turrell Ave., South Orange, N. J.
Zurett, Melvin H., 1650 East Ave., Rochester 10, N. Y.

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